TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~229~~. 47.

N. L. REARICK, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

FILED JUNE 13, 1905.

(19,801.)

(19,801.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 299.

N. L. REARICK, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

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1 In the Superior Court of Pennsylvania, Sitting in Philadelphia, October Term, 1903.

No. 171.

COMMONWEALTH OF PENNSYLVANIA, Appellee,
against
N. L. REARICK, Appellant.

Petition for the Allowance of Writ of Error to the Supreme Court of the United States.

To the Honorable Henry B. Brown, Associate Justice of the Supreme Court of the United States:

The petition of N. L. Rearick respectfully represents:

That he brought a suit into the Superior Court of Pennsylvania, No. 171, October Term, 1903, on appeal from the judgment of the court of Quarter Sessions of Northumberland County, No. 173 May Sessions, 1902, which court had affirmed a judgment of conviction pronounced against your petitioner, the appellant in the Superior Court, by J. P. Carpenter, a Justice of the Peace in and for Northumberland County, in whose court your petitioner was the defendant, as he was also in said court of Quarter Sessions.

That before the said Justice of the Peace your petitioner was charged with having violated the provisions of an ordinance of the borough of Sunbury, in said county of Northumberland, which ordinance was approved Dec. 9, 1899, and by which ordinance it is made unlawful for any person to solicit orders for, sell, or deliver at retail on the streets, or by traveling from house to house within the limits of the borough of Sunbury any goods not of his own
2 production or manufacture, without first having procured a license for the privilege as required by said ordinance.

That at the trial of said charge before said Justice of the Peace your petitioner pled not guilty, and claimed that he was not liable to pay the license tax required by said ordinance to be paid; and that he could not be punished for any violation of said ordinance, because the only act within the purview of said ordinance which he had done was to deliver goods that had been sent to him by his principal, The Citizens' Wholesale Supply Company, from Columbus in the state of Ohio to be by him, as the agent of said company, delivered to persons living in the Borough of Sunbury, state of Pennsylvania, who had previously ordered the same from the said Company through another of its agents. Your petitioner further claimed that in making the delivery of said goods as aforesaid he was engaged in commerce among the states and that he was exempt on that account from the operation of said ordinance. Your petitioner further claimed that said ordinance was void because it deprived persons of liberty and property without due process of law and denied the equal protection of the laws by excepting from its operation persons

who manufacture and produce and also because it applies only to those who sell or deliver at retail.

That the said Justice of the Peace, on the 29th day of June, 1902, notwithstanding the said objections of your petitioner, rendered judgment of conviction against your petitioner for a violation of said ordinance and sentenced him to pay a fine of $25.00 and costs, or to stand committed to the jail of the County of Northumberland for a period of thirty days and until said fine and costs were paid.

That from said judgment of conviction your petitioner appealed to the Court of Quarter Sessions of Northumberland County, which court on the 6th day of July 1903 ordered said judgment to
3 be affirmed. That from said judgment of the court of Quarter Sessions your petitioner appealed to the Superior Court of Pennsylvania, sitting at Philadelphia, which Court on the 27th day of October 1904 ordered the said judgment of said Court of Quarter Sessions to be affirmed and afterwards on the 27th day of October 1904, the said judgment was duly entered and recorded in the office of the Prothonotary of said court at Philadelphia. That your petitioner then filed his petition in the Supreme Court of Pennsylvania, Eastern District, for the allowance of an appeal to said Supreme Court of Pennsylvania from said judgment of said Superior Court; but that said Supreme Court on the 6th day of January 1905 made an order refusing to allow said appeal, which order was duly entered and recorded on the 6th day of January 1905 in the Eastern District of Pennsylvania. Your petitioner further says, that by reason of the refusal of said Supreme Court of Pennsylvania to allow an appeal from the said judgment of the Superior Court as aforesaid, said judgment of the Superior Court is a judgment of the highest court of record in Pennsylvania in which a decision in this case can or could be had. That the judgment of said court is final.

That the right, title, privilege, and immunity claimed by your petitioner before the Justice of the Peace, were claimed by him also before the court of Quarter Sessions of Northumberland county as well as before the Superior Court of Pennsylvania and also in his petition to the Supreme Court of Pennsylvania for the allowance of an appeal, and were claimed under Clause 3, Section 8, of Article 1, of the Constitution of the United States which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes" and also under Section 1 of the 14th Amendment to the Constitution of the United States which provides, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of
4 life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That the decision and judgment of the Superior Court of Pennsylvania aforesaid, were against the right, title, privilege and immunity so claimed as aforesaid.

Your petitioner therefore prays for the allowance of a Writ of Error to the Supreme Court of the United States, in order that the

said judgment of the Superior Court of Pennsylvania may be re-examined and reversed or affirmed in the Supreme Court of the United States, and he will ever pray.

N. L. REARICK, *Petitioner,* [SEAL.]
By MAX L. MITCHELL,
PHILEMON S. KAHSHNER,
His Attorneys.

STATE OF DELAWARE, *County of New Castle, ss:*

N. L. Rearick, being duly sworn according to law, deposes and says that he is the petitioner above named, and that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

N. L. REARICK.

Sworn to and subscribed before me this eighth day of May 1905.

[Seal of Alton C. Pyle, Notary Public, Delaware. Appointed December 2,, 1902, for Four Years.]

ALTON C. PYLE,
Notary Public, Notary Public, 805 *Shipley Street, Wilmington, Del.*

5 Superior Court of Pennsylvania, Sitting at Philadelphia, October Term, 1903.

No. 171.

COMMONWEALTH OF PENNSYLVANIA, Appellee,
vs.
N. L. REARICK, Appellant.

Appeal of N. L. Rearick from the Judgment in the case in which the Commonwealth of Pennsylvania was plaintiff and the above named appellant defendant, and now, to-wit; May 15th 1905, citation awarded and Writ of Error allowed by me.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Petition.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court, to No. 171 October Term, 1903 before you, or some of you, being the highest

court of law or equity of the said State in which a decision could be had in the said suit between the Commonwealth of Pennsylvania plaintiff and appellee in said Superior Court, and N. L. Rearick, defendant, and appellant in said Superior Court wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
7 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said N. L. Rearick as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within Thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the Fifteenth day of May, in the year of our Lord one thousand nine hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Writ of Error.

8 UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, with[illegible] thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Superior Court of Pennsylvania, to No. 171 October Term 1903 wherein N. L. Rearick is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error

mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry B. Brown, Associate Justice of the Supreme Court of the United States, this Fifteenth day of May, in the year of our Lord one thousand nine hundred and five.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

On this Sixth day of June, in the year of our Lord one thousand nine hundred and five 1905, personally appeared Harry S. Knight before me, the subscriber, a Justice of the Peace for Pennsylvania resident in Northumberland County and makes oath that he delivered a true copy of the within citation to Aamos Bloom special official for the Commonwealth in the prosecution who expressed his willingness to accept such service on behalf of the Commonwealth.

HARRY S. KNIGHT.

Sworn to and subscribed the 7th day of June, A. D. 1905.
[SEAL.] J. P. CARPENTER, *J. P.*

Commission expires first Monday of May 1909.

9 *Bond.*

Bond on Writ of Error from Supreme Court of the United States.

Know all men by these Presents: That we, N. L. Rearick, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of Five Hundred Dollars, to be paid to the said Commonwealth of Pennsylvania, its certain attorney or assigns, to which payment well and truly to be made we do bind ourselves, our executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the Eighth day of May in the year of our Lord one thousand nine hundred and five (1905).

Whereas lately before J. P. Carpenter, a Justice of the Peace in and for Northumberland County, Pennsylvania, a judgment of conviction was entered against N. L. Rearick, at the suit of the Commonwealth of Pennsylvania, which judgment was afterwards affirmed by the Superior Court of Pennsylvania, in a certain plea and suit in said court, October Term, 1903, No. 171, and the said N. L. Rearick having obtained a Writ of Error to the Supreme Court of the United States to reverse the said Judgment in
10 the last above entitled action, and having filed a copy thereof in the office of the Prothonotary of said court and a citation directed to the said Commonwealth of Pennsylvania, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the 15th day of June 1905.

Now the condition of the above obligation is such that if the said N. L. Rearick shall prosecute his said Writ of Error to effect and

answer all damages and costs, if he shall fail to make his plea good, then the above obligation to be void, else to be and remain in full force and virtue.

N. L. REARICK. [SEAL.]
FIDELITY & DEPOSIT CO. OF MARYLAND,
By T. L. PAINTER, *Member of Local Board.*

Witness:
ALTON C. PYLE.

Attest: MONMAN & HUDIC, *Ag'ts.*

Approved by
BROWN,
Associate Justice of the Supreme Court of the United States.

STATE OF DELAWARE, *County of New Castle, ss:*

Personally appeared before me Alton C. Pyle, a Notary Public in and for the State and County aforesaid N. L. Rearick who by me duly sworn in due form doth acknowledge the above to be his hand and seal for the purpose herein mentioned.

Witness my hand and seal this the Eighth day of May A. D. 1905.

[SEAL.] ALTON C. PYLE,
Notary Public, 805 *Shipley Street, Wilmington, Del.*

Endorsement: Bond.

11 Superior Court of Pennsylvania, Sitting at Philadelphia.

Among the Records and Proceedings of the Superior Court of Pennsylvania, *inter alia*, the following is thus contained:

Appearance Docket.

Docket Entries.

October Term, 1903, No. 171.

171.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,
v.
N. L. REARICK, Defendant.

Harry S. Knight
Max L. Mitchell
P. S. Karshner

Appeal of Defendant Q. S. 173 May Sess. 1902 from the Judgment
Appeal from the Court of Quarter Sessions of the County of Northumberland
Filed July 27, 1903
Eo die Certiorari exit

Ret'ble the Fourth Monday of October 1903
August 21, 1903 Service of notice of Appeal filed.
October 24, 1903 Record returned and filed.
12 October 28, 1903 Assignments of Error filed
October 30, 1903 Argued
October 27, 1904 The judgment is affirmed
Opinion by Porter, J.
Henderson, J. dissents.
November 2, 1904 Remittitur exit and with Record sent to the Clerk of the Court of Quarter Sessions of Northumberland County

In Supreme Court of Pennsylvania.

November 25, 1904 Petition for an allowance of an appeal from the Superior Court of Penna. filed on motion of Max L. Mitchell
December 31, 1904 Appeal refused.
Per Curiam
May 22, 1905 Petition for an allowance of a Writ of Error to the Supreme Court of the United States brought into office,
And now, to wit, May 15, 1905, citation awarded and Writ of Error allowed by me."
H. B. Brown, Associate Justice of the Supreme Court of the United States.
13 *Eo die* Bond in $500.00 approved by Brown, Associate Justice of the Supreme Court of the United States filed.
Eo die Writ of Error to the Superior Court of Pennsylvania brought into office.
June 8, 1905 Citation brought into office, allowed by Brown, Justice (with proof of service).
June 12, 1905, Certified transcript of Record exit and sent to the Hon. James H. McKenney, Clerk of the Supreme Court of the United States.

14 *Appeal and Affidavit.*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

In the Court of Quarter Sessions of the County of Northumberland, May Sessions, 1902.

No. 173.

COMMONWEALTH OF PENNSYLVANIA
v.
N. L. REARICK.

Enter Appeal on behalf of Defendant from the Judgment of the Court of Quarter Sessions of the County of Northumberland.
To Lewis C. Greene, Proth'y Sup. Ct.

MAX L. MITCHELL,
P. S. KARSHNER,
Attorneys for Appellant.

COUNTY OF LYCOMING, *ss:*

Max L. Mitchell being duly sworn saith that said Appeal is not taken for the purpose of delay, but because appellant believes he has suffered injustice by the Judgment from which he appeals.

MAX L. MITCHELL,
Attorney for Appellant.

Sworn and subscribed, before me this 25th day of July A. D. 1903.

B. S. BENTLEY,
Prothonotary, 3rd District.

15 Endorsement: 171 October Term 1903 Superior Court of Pennsylvania Sitting at Philadelphia. Commonwealth of Pennsylvania *v.* N. L. Rearick Appellant Appeal and Affidavit. Filed in the Superior Court Jul- 27, 1903. Max L. Mitchell, P. S. Karshner Attorneys for Appellant.

16 *Præcipe for Certiorari.*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

No. 173.

N. L. REARICK, Appellant.

Certiorari to the Court of Quarter Sessions of the County of Northumberland, of May Sessions, 1902.

Issue Certiorari to the Court of Quarter Sessions of the County of Northumberland to bring up record and proceedings in a certain action in said Court, No. 173 May Sess. wherein The Commonwealth of Pennsylvania is Plaintiff and N. L. Rearick is Defendant.

Returnable to next Term, *Sec. Reg.*

To Lewis C. Greene, Prothonotary Superior Court, Sitting at Philadelphia

MAX L. MITCHELL,
P. S. KARSHNER,
Attorneys for Appellant.

Endorsement: 171 October Term 1903 Superior Court of Pennsylvania Sitting at Philadelphia. Commonwealth of Pennsylvania *v.* N. L. Rearick, Appellant Præcipe for Certiorari. Filed in the Superior Coury, Jul- 27, 1903 Max L. Mitchell, P. S. Karshner, Attorneys for Appellant.

17 *Petition for Allowance of an Appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania.*

In the Supreme Court of Pennsylvania, Eastern District.

In the Superior Court of Pennsylvania, Oct. Term, 1903.

No. 171.

In the Court of Quarter Sessions of Northumberland County.

COMMONWEALTH OF PENNSYLVANIA, Appellee,

vs.

N. L. REARICK, Appellant.

Petition for Allowance of Appeal from Superior Court.

To the Honorable the Judges of the Supreme Court of Pennsylvania:

The petition of N. L. Rearick, the defendant below, and the appellant, by his attorney, P. S. Karshner and Max L. Mitchell respectfully represents:

That he appealed to the Superior Court from the judgment of the Court of Quarter Sessions of Northumberland county, affirming the judgment of a justice of the peace of said county, imposing, under the provisions of an ordinance of the borough of Sunbury, approved December 9, 1899, a fine of $25 and costs upon the petitioner; which judgment was affirmed by the Superior Court on Oct. 27, 1904.

The questions involved are:—

1. Whether an agent of a business house in one State, who
18 delivers merchandise, consigned to him for that purpose by his principal, to residents of another State who had previously ordered the same, is engaged in interstate commerce?

2. Whether an ordinance of the Borough of Sunbury violates Section 1 of the Fourteenth Amendment of the Constitution of the United States?

The questions involved as stated above were raised in the Superior Court by the appellee's assignments of error Nos. 1 to 6 inclusive, printed on pages 30 to 33 inclusive in his paper book.

(The opinion of the Superior Court in this case is on page 24 of this Record.)

The grounds upon which an appeal to the Supreme Court of Pennsylvania is asked are:

1. That the case involves the construction and application of Clause 3, Section 8, Article 1, of the Constitution of the United States, and that the said clause was wrongly construed and applied by the Superior Court.

2. That the case involves the construction and application of Clause 1 of the Fourteenth Amendment of the Constitution of the United States, and that said clause was wrongly construed and applied by the Superior Court.

19 3. That said case involves the construction and application of the last clause of Section 1, of the Fourteenth Amendment of the Constitution of the United States, and that said clause was wrongly construed and applied by the Superior Court.

Copies of the paper book in the Superior Court accompany this petition. By reference to these paper books the principles of justice which, with the greatest respect for the court below, the petitioner most humbly insists entitle him to the remedy of the appeal asked for, will more fully appear.

Wherefore the petitioner prays that he may be allowed an appeal to this court. And he will ever pray, etc.

N. L. REARICK,
By His Attorneys, P. S. KARSHNER AND
MAX L. MITCHELL.

Endorsement: No. —. Page 212 Commonwealth of Pennsylvania *v.* N. L. Rearick Appeal from Superior Court by N. L. Rearick. Petition for allowance of an appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania Filed Nov. 25, 1904 In Supreme Court. *Appeal refused Per Curiam* Dec. 31, 1904. P. S. Karshner, Max L. Mitchell.

20 *Assignments of Error.*

In the Superior Court of Pennsylvania.

No. 171, October Term, 1903.

COMMONWEALTH OF PENNSYLVANIA, Appellee,
v.
N. L. REARICK, Appellant.

Appeal from the Court of Quarter Sessions of Northumberland County.

Assignments of Error.

The Court erred in refusing the defendant's first point, which point and the answer of the Court thereto are as follows:

"All of the acts of the defendant complained of as illegal in this case, and for which he was arrested under the provisions of the ordinance of the borough of Sunbury, approved December 9th, 1899, which ordinance is recited in the statement of facts agreed upon, were done in carrying on interstate commerce, and the arrest of the defendant is illegal and void because the ordinance above referred to, so far as it applies to the defendant, is in restraint of interstate commerce and is therefore a violation of Clause 3, Section 8 of Article 1, of the Constitution of the United States, which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes." Answer: Refused.

21 2. The Court erred in refusing the defendant's second point, which point and the answer of the Court thereto are as follows:

"The arrest of the defendant is illegal and void because the ordinance of December 9, 1899, so far as the defendant is concerned, is in restraint of trade. It abridges the right, freedom and liberty of contract and for that reason violates Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" Answer: Refused.

3. The Court erred in refusing the defendant's third point which point and the answer of the Court thereto are as follows:

"The arrest of the defendant is illegal and void because, so far as the defendant is concerned, the ordinance of December 9, 1899, is unconstitutional in that it discriminates between persons and denies equal protection of the laws. It gives rights, privileges and immunities to some which it denies to others. It is in violation of the last clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that 'No state * * * shall deny to any person within its jurisdiction the equal protection of the laws.'" Answer: Refused.

22 4. The Court erred in that part of his opinion wherein he said: "Before delivery, therefore, they (the brooms) ceased to be subjects of interstate commerce and became mingled with the common mass of property of the state, and therefore subject to the laws and ordinances of the Commonwealth."

5. The Court erred in that part of his opinion wherein he said: "While they (the brooms) had in a certain manner been designated at Columbus as property to be delivered to the persons whose names were on the respective tags, and were delivered to the railroad company as a common carrier, yet they remained in the custody and control of the company, or their agent, the defendant. The title to the brooms did not pass to the person who had ordered them until delivered at his house, and they had been by him inspected and paid for. If the purchaser refused to accept any pay for his purchase the defendant's duty was to return the refused articles to his principal at Columbus. The place of sale, therefore, of these articles was the borough of Sunbury."

6. The Court erred in that part of his opinion wherein he said: "Being of the opinion that the defendant is guilty of a violation of the said ordinance in the sale of brooms as above described, the judgment of the Justice of the Peace imposing a fine of $25 and costs upon the said N. L. Rearick is affirmed."

P. S. KARSHNER,
MAX L. MITCHELL,
Att'ys for Appellant.

23 Endorsement: No. 171, October Term, 1903. In the Superior Court of Pennsylvania. Commonwealth of Pennsylvania *v.* N. L. Rearick. Assignments of Error. Filed in the Superior Court Oct. 28, 1903.

24 *Opinion.*

In the Superior Court of Pennsylvania.

No. 171, October Term, 1903.

COMMONWEALTH OF PENNSYLVANIA
v.
N. L. REARICK.

Appeal from the Court of Quarter Sessions of Northumberland County.

Filed Oct. 27, 1904.

Opinion by PORTER, *J.:*

The defendant was convicted under the provisions of an ordinance of the Borough of Sunbury requiring all "persons who sell at retail, by sample or otherwise, or solicit orders at retail, or deliver at retail, either on the streets or by traveling from house to house within the limits of the Borough of Sunbury any books, paintings, foreign or domestic goods, wares, merchandise or fruits, not of their own manufacture or production, without first obtaining from the chief burgess of the Borough of Sunbury, a license for such purpose;" and imposing a penalty for "selling, canvassing or delivering as aforesaid, without having first obtained and paid for a license." The authority of the borough to require persons canvassing from house to house and upon the streets, for the purpose of selling goods at retail,
25 or delivering goods in pursuance of orders obtained by such canvassing, to take out a license, and to impose a penalty for the violation of such an ordinance is within the police power delegated by the general borough law of April 13, 1851, P. L. 320; Borough of Warren *v.* Geer, 117 Pa. 207; North Wales Borough *v.* Brownback, 10 Pa. Superior Ct. 227; North Wales Borough *v.* Brownback, 194 Pa. 609; Mechanicsburg Borough *v.* Koons, 10 Pa. Superior Ct. 131. The specifications of error in this case do not raise any question of the delegation by the state to the borough of the authority to regulate by ordinance the business of itinerant dealers selling their wares upon the streets and by canvassing from house to house; nor do they involve any consideration of the sufficiency of the testimony to warrant a finding that the defendant had violated the provisions of the ordinance. The only questions raised in the court below, or upon this appeal, involve the rights of the defendant under the Constitution of the United States.

The appellant has, as required by the rules of this court, stated the questions involved in this proceeding to be: "1. Whether an

agent of a business house in one state, who delivers merchandise consigned to him for that purpose by his principal, to residents of another state, who had previously ordered the same, is engaged in interstate commerce?" and "2. Whether the ordinance of the Borough of Sunbury violates Section 1 of the Fourteenth Amendment of the Constitution of the United States." We have, therefore, to deal with only Federal questions.

26 The consideration of the first question necessarily involves an examination into the provisions of the contract and the manner of performance thereof, as agreed upon in writing by the parties in the court below. The Citizens' Wholesale Supply Company is a corporation organized under the laws of the state of Ohio, located and doing business as grocers in the city of Columbus in said state. The business includes the selling of groceries, sundries, and other articles for domestic purposes. In conducting said business the corporation employs agents who, under the directions of the company, solicit orders for groceries and articles of like character by exhibiting samples, in the state of Pennsylvania and other states of the Union by going personally to residents and citizens of said states, and when necessary from house to house in said states. Kunkle, a resident of the state of Pennsylvania, was employed by said company to solicit orders for groceries and other articles in the manner stated, and during the month of March 1902, went from house to house in the Borough of Sunbury, and solicited and took orders for groceries in the manner aforesaid, "being such goods as are usually sold by grocers." After he had taken a large number of orders for goods, said orders were forwarded to the company at Columbus, Ohio, whereupon said corporation filled said orders in the following manner: "If a particular person ordered twenty pounds of sugar, ten pounds of coffee, ten pounds of prunes and fifteen pounds of rice, the company put up in packages twenty pounds of sugar, ten pounds of coffee, ten pounds of prunes and fifteen

27 pounds of rice. These packages to fill this particular order were then placed in one or more boxes, the lids placed on the box or boxes and nailed fast. The name of the agent of the company who was to make the delivery of the packages at Sunbury and the name of the purchaser of the contents of each box was then stenciled on said box or boxes." N. L. Rearick was the agent of the company to receive the goods at Sunbury, and the goods to fill each particular order were placed in one or more boxes and closed as aforesaid, and marked "N. L. Rearick, Sunbury, Pa. For Mrs. Dan Daly," or whatever the name of the purchaser was. All goods were marked and packed in this manner with the exception of brooms. The orders for brooms were filled in the following manner: "If any man say John Smith, ordered one broom, which was included in his order for other goods, a broom was selected at the place of business of said company at Columbus, Ohio, to fill said order and a tag was marked in the following manner, and tied by a string to the handle of said broom: 'To N. L. Rearick, Sunbury, Pa. For John Smith, one broom; from the Citizens' Wholesale Supply Company, Columbus, Ohio.'" If any customer ordered more than one broom,

the figure before the word broom o.. the tag was changed accordingly and the tag was tied to a string which was wrapped around and tied to the handles of all the brooms ordered by that customer. "All brooms ordered by the several purchasers were selected to fill the order and packed in a similar manner to that above described.

28 The brooms were then aggregated together in bundles of a dozen each, or some such number, a paper wrapped around the straw part and around the paper and the bundles a twine was wound and tied to keep the bundles together. The brooms were tied in bundles solely for convenience in shipping. The brooms and boxes above described were then shipped from Columbus, Ohio, by said company, over the Pennsylvania Railroad, to its agent, N. L. Rearick, at Sunbury, Pa." The corporation kept no book accounts with the parties from whom orders had been taken by Kunkle, and extended no credit to such persons. The goods were sold for cash, to be paid for upon delivery at the residence of the several purchasers. All the goods shipped in pursuance of the orders were shipped to Rearick for delivery, and he was held responsible therefor, the goods were consigned to Rearick, and he alone had authority to obtain them from the railroad company. Rearick is a citizen of the United States and of the State of Pennsylvania, and is a general agent, on a fixed salary, of the Citizens' Wholesale Supply Company. He had under his charge the agents of said company, located in a certain portion of the state of Pennsylvania, including the Borough of Sunbury. It was his duty, among other things, to make delivery of goods, shipped by his principal, said company, into his district, to fill orders previously taken by other agents. Rearick went to Sunbury, on April 14, 1902, to deliver the goods, the orders for which had been taken by Kunkle; he received the car and with the assistance of Kunkle delivered the goods to the purchasers at their

29 residences in the following manner: "The boxes marked for persons living in a selected locality were taken from the car and placed in a wagon. Kunkle and Rearick then took the wagon with the goods to a selected locality and stopped at the houses of the respective purchasers. At the house of each purchaser they took from the wagon such boxes as were marked for such purchaser and delivered them to him and received from such purchaser payment therefor. This they did at the houses of all persons who had ordered goods." The money collected was by Rearick forwarded to his principals, at Columbus, Ohio. The above were the facts agreed upon with regard to delivery of the goods which had been packed in boxes, but the manner of delivering brooms was different, as to the latter the material facts agreed upon were as follows. On opening the car Rearick cut the twine that bound the brooms together in the bundles in which they had been shipped, and removed the paper in which the package had been wrapped. The brooms of which the package had been composed were separated, and one or more brooms, according to the order, delivered, each purchaser receiving the broom that had been marked for him, as hereinbefore described. No broom nor box was delivered to any one but the person who had ordered it and for whom it was marked.

While the agreement upon the facts was thus specific as to the manner in which the goods were delivered, the terms of the original contract for the sale were equally free from doubt. The sale was by sample; the goods were "such as are usually sold by grocers;" the delivery was to be at the residence of the purchaser in
30 Sunbury; and each purchaser had the right to examine the goods when delivered, and if the same were not equal to the sample shown by Kunkle at the time the order was taken could refuse to accept them. A copy of one of the orders which Kunkle had forwarded to his principals was attached to the agreement as to the facts, but the agreement does not state that these orders were signed by the proposed purchasers, and the only inference to be drawn from the facts agreed upon touching that point is that Kunkle had indorsed the name and address of the purchaser upon each order. The agreement as to the facts would not warrant a finding that the contract was that the goods should be shipped from Columbus by the Supply Company to the purchaser, and if such had been the contract it was not performed according to its terms. These were contracts, made in Pennsylvania, to deliver goods at the residences of the purchasers in Pennsylvania. The contracts of sale were, judged by their provisions only, executory contracts relating to commerce within the state of Pennsylvania, and were subject to the laws of this state. The appellant's principal could have fil-ed these contracts by tendering delivery of any goods of the kind and quality of the sample shown, obtained from sources within the state of Pennsylvania; whether the contemplated traffic should go outside the state or not was left to chance or extrinsic business considerations. The performance of the contracts was, therefore, not necessarily concerned with interstate commerce; Diamond Glue Company *v.* United States Glue Company, 187 U. S. 611. If the tran-
31 saction ever came within the protection of the interstate commerce clause of the Federal Constitution, it was not because of the inherent covenants of the contract, but from the manner in which those covenants were executed.

The mere fact that this applicant was a citizen of Pennsylvania, while those with whom he dealt were also residents of this state, is not in this case, material, nor is the fact that the principals of the appellant were citizens of Ohio of any weight in determining whether the transactions of the defendant involved only domestic commerce, to be controlled by the laws of Pennsylvania, or interstate commerce and within the protection of the powers of the national government. A citizen of Pennsylvania and a citizen of any other state are alike within the protection of the provisions of the Constitution of the United States in bringing goods into the state for purposes of sale, or in consequence of a sale, in making contracts with relation thereto and carrying such contracts into effect; Schollengerger *v.* Pennsylvania, 171 U. S. 1; Stockard *v.* Morgan, 185 U. S. 27. The rights of the defendant are to be determined from the covenants of the contract and what was done under them, and are in no wise dependent upon his place of residence or that of his principal.

That the power to regulate commerce between the states is ex-

clusively vested in Congress cannot be questioned. A state has no right to tax the people representing the owners of property
32 outside of the state, for the privilege of soliciting orders within it, as agents for such owners, for property to be shipped to persons within the state: Robbins *v.* Shelby Taxing District, 120 U. S. 489; Stockard *v.* Morgn, 185 U. S. 27; Brennan *v.* Titusville, 153 U. S. 289. Such a contract necessarily involves interstate commerce, the goods are without the state, the contract requires that they shall be consigned to the shipper, and delivered within the state. The purchaser could decline to accept performance in any other way. The agent who in good faith, on behalf of his principal, solicits and obtains such a contract for the importation of goods acts within the protection of the Constitution of the United States and there is a question whether he could be rendered liable to a local tax or license charge, although his principal, with the acquiescence of the purchaser, should subsequently depart from the terms of the contract and perform by delivering goods procured from some source within the state. Upon the other hand where the contract is one which may be performed by procuring goods from any source, if the vendor procures his supply from without the state and delivers the goods to the purchasers in the original package of importation, those making the deliveries are in position to invoke the protection of the interstate commerce clause of the Constitution of the United States.

The importer, whether he be a citizen of the state or not, may sell the goods in the original packages, free from state regulation:
33 Leisy *v.* Hardin, 135 U. S. 100; Lyng *v.* Michigan, 135 U. S. 161; Schollenberger *v.* Pennsylvania, 171 U. S. 1. The power of the state over the goods imported commences when the importer has so acted upon the importation that it has become incorporated and mixed with the mass of property in the state, which happens when the original package is no longer such in his hands: Brown *v.* Maryland, 12 Wheaton 419; Leisy *v.* Hardin, 135 U. S. 100. When the importer has so acted upon the thing imported that it has lost its distinctive character as an import, and he undertakes to distribute the contents of the package to a large number of distinct purchasers, or the performance of a number of independent executory contracts of sale, made prior to the importation with different parties, such delivery is no longer interstate, but has become domestic commerce and is subject to state control, so long as that control is exercised in a manner which does not involve discrimination, among dealers or the sources from which the goods come: May *v.* New Orleans, 178 U. S. 496; Austin *v.* Tennessee, 179 U. S. 343.

The appellant contends that the case of Caldwell *v.* North Carolina, 187 U. S. 622, decides that a delivery of goods in the manner adopted in this case is within the interstate commerce clause of the Constitution. We cannot assent to this proposition. In that case the defendant was delivering pictures and frames in North Carolina in pursuance of contracts previously made by other agents of his principal, the Chicago Portrait Company, a corporation of the
34 city of Chicago, Illinois. The opinion of Mr. Justice Shiras, speaking for the Court, clearly indicates that under the pro-

visions of the contract the Chicago corporation had undertaken to make and deliver the pictures and frames to the respective purchasers in Greensboro, North Carolina; the pictures and frames were made in Chicago, in pursuance of the several contracts, and were shipped to Greensboro, consigned to the Chicago Portrait Company; the defendant received from the carrier the various packages containing the pictures and frames, took them to a hotel in the city of Greensboro, opened the packages, placing each picture in the frame designed for it, and from this point delivered the pictures one at a time to the several purchasers. The defendant was convicted of violating a city ordinance requiring a license, the Supreme Court of North Carolina affirmed the judgment, and the Supreme Court of the United States reversed that decision. The contract in that case was for the making of specific articles, to be made in Illinois, and delivered to the purchaser in North Carolina: The party who contracts for a picture and a frame designed for it, or a piece of machinery of a peculiar design, to be made by a certain person or manufacturer in another state, contracts for the skill of that particular artist or maker, and the tender of an article of the same general character, originating from any other source would not be a compliance with the terms of the contract. If the contract is to be performed according to its terms the article must be made in one
35 state and sent into another. This necessarily involves interstate commerce. The pictures and frames were made in Chicago, presumably by the persons for whose skill the purchasers had contracted, and were delivered in Greensboro, North Carolina, in literal compliance with the contract. The question was whether the manner in which the delivery was made had taken the whole transaction out of the protection afforded by the Federal Constitution against local regulation of interstate commerce. Mr. Justice Shiras said, in speaking of the reasoning of the opinion of the Supreme Court of North Carolina: "It seems to proceed upon two propositions—first, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro." And in discussing those propositions said: "That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and placing the pictures in their proper places, (the language of the verdict) meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture. Nor does the fact that the articles were not shipped separately and directly to each individual purchaser, but were sent to the agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would
36 seem evident that, if the vendor had sent the articles by express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to such taxation. The same could be said if the vendor, or by a personal agent,

had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate. Transactions between manufacturing companies in one state, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution." The points decided in that case were: (1) That in making deliveries, in performance of contracts necessarily involving interstate commerce, the vendor might make the delivery by himself, or by a personal agent, or through a carrier, or he might employ any or all of said agencies; and (2) That the shipment of the picture and the frame designed for it in separate packages did not involve an introduction of the goods into Greensboro in an incomplete condition. It does not appear in the report of that case that goods intended to be delivered to different purchasers were imported in the same package.
37 The several pictures and frames may have been in different packages, in which case each purchaser would receive the entire contents of two original packages. An importation of goods may be divided into any number of original packages and still be subject to national control, it is only when the contents of an original package is divided for the purpose of distribution that the goods become subject to local regulation. The removal of the outer covering, does not necessarily change the character of the importation as an original package, a specific object may retain its identity, although the box or bag which has protected it during transportation has been removed. The vital element is the retention of the identity of the contents of the package, as a unit of importation: Commonwealth *v.* Leslie, 20 Pa. Superior Ct. 529.

The contention of the appellant that in this case the original packages of importation were the single brooms with tags ties to them which composed the packages of one dozen into which the brooms were made up for the purpose of shipping them from the state of Ohio into Pennsylvania, cannot be sustained. The single brooms did not constitute the package in which the importation was actually made; nor was there any evidence that in *bona fide* transactions carried on between the manufacturer and the wholesale dealer residing in different states one broom ordinarily, or ever, was shipped or carried as a package for purpose of importation. There is no necessity for extended citation of authority as to what constitutes an
38 original package, *package,* the whole question was fully discussed in Austin *v.* Tennessee, 179 U. S. 343. The brooms with which the defendant dealt were not delivered in original packages. The other goods packed in boxes, under the facts agreed upon in this case were delivered in original packages; the defendant does not seem to have delivered a part of the contents of any box, and no

purchaser seems to have refused to accept any part of the goods which were so packed in boxes. We are of opinion that the facts agreed upon as to the delivery of the brooms rendered the transaction subject to state regulation.

The ordinance in question violates no right of the appellant guaranteed by the Fourteenth Amendment of the Constitution of the United States. That a state may by statute, and a municipality by ordinance, under authority duly delegated, enact and ordain reasonable regulations with regard to peddling and canvassing for the sale of goods from house to house has been long and definitely settled; Emert *v.* Missouri, 156 U. S. 296. A state has power to provide for the security of the lives, health and comfort of persons and the protection of property, and impose taxes upon persons residing within the state or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, but in making such internal regulations, a state cannot discriminate adversely to the persons or property of other states, and such regulations must be equal and uniform; Powell *v.* Pennsylvania, 127 U. S. 678; Otis *v.* Parker, 187 U. S. 606; Austin *v.* Tennessee, 179 U. S. 343. The ordinance in question ap-
39 plies equally and uniformly to all persons, without regard to their places of residence, or any other qualification All who sell by canvassing and delivering from house to house, articles, "not of their own production or manufacture" are required to procure a license. Manufacturers and producers are only excepted so long as their sales are confined to the articles produced by them. When such persons attempt to sell articles produced by others they must, under the provisions of their ordinance, procure a license. The ordinance, therefore, requires all dealers, those who buy to sell again, to take out a license. Those who make to sell, and sell only what they make, are not dealers and are not subject to the provisions of this ordinance. This is the classification upon which the whole mercantile tax system of Pennsylvania it today founded; and such classification has by the Supreme Court of the United States been held not to offend against the provisions of the Fourteenth Amendment: American Sugar Refining Company *v.* Louisiana, 179 U. S. 89. The power of a state to classify for purposes of taxation, has been clearly recognized, and the government of the United States had consistently pursued the same policy. The classification adopted in this ordinance exempts producers from the taxation of the methods employed by them to put their products upon the market, which is precisely what was done under the Louisiana statute, passed upon in the case just cited. The classification attempted in the Illinois statute, which
40 was by the Supreme Court of the United States, in Conolly *v.* Union Sewer Pipe Company, 184 U. S. 540, held to be unconstitutional, did not dissolve an exercise of the taxing power but it attempted a classification which had no relation to the subject matter of the statute and no connection with the reason for nor subject matter of the legislature.

The judgment is affirmed.

Henderson, J. dissents.

41 *Certiorari.*

The Superior Court of Pennsylvania, Sitting at Philadelphia, *ss:*

[SEAL.] The Commonwealth of Pennsylvania to the Justices of the Court of Quarter Sessions for the County of Northumberland, Greeting:

We being will- for certain causes, to be certified of the matter of the Appeal of N. L. Rearick from the Judgment in No. 173 May Sessions 1902 wherein the Commonwealth of Pennsylvania was plaintiff and the said appellant was defendant, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Superior Court of Pennsylvania, at a Superior Court to be holden at Philadelphia, the Fourth Monday of October next, so full and entire as in our Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, Doctor of Laws, President Judge of our said Superior Court at Philadelphia, the twenty-seventh day of July in the year of our Lord one thousand nine hundred and three.

LEWIS C. GREENE,
Prothonotary.

42 (On the back of the paper.)

I certify that Max L. Mitzhell is surety in the within case, in the sum of two hundred $200 Dollars.

J. A. McCARTHY,
Prothonotary.

To the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, sitting at Philadelphia:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

VORIS AUTEN, [SEAL.]
A. L. J.

Endorsement: 173 May Sess. 1902 Q. S. Northumberland No. 171 October Term 1903 Superior Court Commonwealth of Pennsylvania *v.* N. L. Rearick Appellant Certiorari to the Court of Quarter Sessions for the County of Northumberland Returnable the Fourth Monday of October 1903. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Filed Jul. 28, 1903 James A. McCarthy, Clerk Filed in the Superior Court Oct. 24, 1903. Max L. Mitchell P. S. Karshner.

43 *Remittitur.*

In the Superior Court of Pennsylvania.

[SEAL.] The Commonwealth of Pennsylvania, to the Justices of the Court of Quarter Sessions for the County of Northumberland, Greeting:

Whereas, By virtue of our Writ of Certiorari from our Superior Court of Pennsylvania, Sitting at Philadelphia, returnable in the same Court on the Fourth Monday of October in the year of our Lord one thousand nine hundred and three a Record was brought into the same Court, upon appeal by N. L. Rearick from your Judgment made in the matter of No. 173 May Session wherein the Commonwealth of Pennsylvania was plaintiff and the said appellant was defendant. And it was so proceeded in our said Superior Court, that the following Judgment was made, to wit: The Judgment is affirmed. And the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the Act of Assembly in such cases made and provided) ordered by the said Superior Court to be remitted to the Court of Quarter Sessions for the County of Northumberland aforesaid as well for execution or otherwise as to justice shall appertain: Whereupon we here remit you the Record of the Judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness, the Honorable Charles E. Rice, Doctor of Laws President Judge of our said Superior Court, at Philadelphia, the 2nd
44 day of November in the year of our Lord one thousand nine hundred and four.

LEWIS C. GREENE,
Pro Prothonotary.

Endorsement: 173 May Session 1902 Q. S. Northumberland Co. No. 171 October Term 1903. Superior Court. Commonwealth of Pennsylvania *v.* N. L. Rearick Appellant Remittitur Atty. 3.00 Filed No. 3, 1904 James A. McCarthy, Prothonotary.

45 *Record of Court of Quarter Sessions.*

STATE OF PENNSYLVANIA, *County of Northumberland, ss:*

Among the Records and proceedings enrolled in the Court of Quarter Sessions of the Peace in and for the County of
[SEAL.] Northumberland in the Commonwealth of Pennsylvania to No. 173 May Sessions 1902, is contained the following:

Copy of Session Docket Entry.

173.

In Re Petition of N. L. Rearick for Right to Appeal from Summary Conviction.

Walter Shipman.

June 30, 1902 Petition of N. L. Rearick praying the Court for the reasons set forth therein, to grant him the right to appeal from the summary conviction, before J. P. Carpenter, Justice of Peace aforesaid presented. And now, June 30, 1902, the foregoing petition read, and after due consideration an appeal is granted to the petitioner as prayer for in the petition. The bail to be fixed for such appeal to be within the discretion of the Justice before whom the summary conviction was had. By the Court. Voris Auten, A. L. J. July 1, 1902, Transcript from Docket of J. P. Carpenter, J. P. and Recognizance in sum of Three Hundred Dollars, with Walter Shipman as surety, filed. Jan. 26, 1903 continued P. C. Feb. 23, 1903 Continued P. C. Mar. 9, 1903 Agreed statement of facts filed. Same day defendant's conclusion of law filed. March 23, 1903
46 Argued and C. A. V. July 9, 1903 Opinion of Court and answer to the defendant's request for conclusions of law, filed. "The judgment of the Justice of the Peace, imposing a fine of $25.00 and costs upon N. L. Rearick, is affirmed." Voris Auten, A. L. J. (seal). Same day an exception is noted and bill sealed for the defendant. Voris Auten, A. L. J. (seal). July 27, 1903 defendant appeals to the Superior Court of Pennsylvania, and makes affidavit that appeal is not for delay &c. and files bond in the sum of $200 with Max L. Mitchell as surety. July 28, 1903 Certiorari from the Superior Court of Pennsylvania sitting at Philadelphia received and filed. Aug. 4, 1903 Record certified.

Petition of N. L. Rearick for Right to Appeal from Summary Conviction.

Order and Decree.

In the Court of Quarter Sessions of the Peace of Northumberland County.

To the Honorable the Judges of said Court:

The petition of N. L. Rearick of the City of Harrisburg, in the County of Dauphin and State of Pennsylvania, respectfully represents:

47 That on the fourteenth day of April 1902, D. A. Breninghaus made an information before J. P. Carpenter, one of the Justices of the Peace in and for the County of Northumberland, charging your petitioner with a violation of an ordinance passed by the Borough of Sunbury on the ninth day of December, 1899, en-

titled "An Ordinance to provide for the licensing of canvassers &c.," a copy of which information is hereto attached and made a part hereof.

Your petitioner further represents that he has also attached a copy of said ordinance to this petition which is also to be taken as part of the same.

Your petitioner further showeth that in pursuance of said information a warrant was duly issued for his arrest, and that he was apprehended on the seventeenth day of June, 1902, and taken before the said J. P. Carpenter, Justice of the Peace, where he entered into a recognizance in the sum of Two Hundred Dollars, with Walter Shipman as surety, conditioned for his appearance for hearing before said Justice, in said case, at two o'clock P. M., on June 27, 1902. That at the time fixed for said hearing he appeared before said Justice, and the case was heard, and after the hearing of the evidence your petitioner was summarily convicted of a violation of said ordinance and sentenced to pay a fine of Twenty-five dollars and costs of prosecution.

Your petitioner further represents that he was acting for the Citizens' Wholesale Supply Company of Columbus, in the State
48 of Ohio, and that the crime with which he was charged consisted of the taking of orders in the Borough of Sunbury, of divers persons, for groceries, spices, brooms, &c., which orders were filed by the Company aforesaid, at Columbus, Ohio, and shipped to Sunbury, Penna., for the persons from whom orders were taken, each customer's goods being shipped in an original package, duly labeled with the customer's name.

Your petitioner is informed and verily believes that the business as conducted by him is within the provisions of the Inter-state Commerce Law, and that the ordinance under which he was convicted is discriminating, and therefore unconstitutional, and that under such circumstances he is protected by the laws relating to Inter-state commerce, and that his conviction, sentence and fine, under the ordinance aforesaid, is in violation of law, and therefore unjust, being a violation of his constitutional rights.

Your petitioner therefore prays your Honorable Court to grant him the right of appeal from the summary conviction aforesaid, and he will ever pray, &c.

N. L. REARICK.

STATE OF PENNSYLVANIA, *County of Northumberland, ss:*

Before me, the subscriber, one of the Justices of the Peace in and for the County aforesaid, personally came N. L. Rearick, the
49 above named petitioner, who being duly sworn according to law deposes and says that the facts set forth in the foregoing petition are true and correct; that the appeal asked for is not for the purpose of delay, but because he verily believes that injustice has been done him.

N. L. REARICK.

Sworn and subscribed to before me this 28th day of June, A. D. 1902.

[SEAL.] WALTER SHIPMAN,
Justice of the Peace.

Decree of Court.

And now, June 30, 1902, the foregoing petition read, and after due consideration an appeal is granted to the petitioner as prayed for in the petition. The bail to be fixed for such appeal to be within the discretion of the justice before whom the summary conviction was had.

By the Court:

VORIS AUTEN, *A. L. J.*

COMMONWEALTH OF PENNSYLVANIA,
County of Northumberland, Borough of Sunbury, ss:

Before me, the subscriber, one of the Justices of the Peace in and for said County, personally came D. A. Breninghaus, who
50 being duly sworn according to law doth depose and say that N. L. Rearick on the 14th day of April, 1902, within the Borough of Sunbury, in Northumberland County, Penna., sold at retail, by sample or otherwise, or solicited orders at retail, and solicited orders for, sold and delivered at retail, upon the streets and by traveling from house to house, foreign or domestic goods, wares and merchandise, not of his own production or manufacture, without first having obtained from the Chief Burgess of Sunbury Borough a license for such purpose, contrary to the ordinance of said Borough of Sunbury entitled "An Ordinance to provide for the licensing of canvassers &c." approved Dec. 9, 1899, and further saith not.

(Signed) D. A. BRENINGHAUS.

Sworn and subscribed before me this 14th day of April, 1902.

(Signed) J. P. CARPENTER.

An Ordinance to provide for the licensing of canvassers and all other persons who sell at retail by sample or otherwise, or who solicit orders at retail, or who solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the Borough of Sunbury, any books, paintings, foreign or
51 domestic goods, wares, merchandise, or fruits, not of their own production or manufacture, and imposing a penalty for a violation of this ordinance.

SECTION 1. Be it enacted and ordained by the Borough of Sunbury, in town council assembled, and it is hereby enacted and ordained by the authority of the same, That after the passage of this ordinance it shall be unlawful for any person or persons to sell at retail, by sample or otherwise, or to solicit orders at retail, or to solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the borough of Sunbury,

any books, paintings, foreign or domestic goods, wares, merchandise or fruits not of their own production or manufacture without having first obtained from the chief burgess of the borough of Sunbury a license for such purpose.

SECTION 2. The license fee required to be paid under the provisions of this ordinance shall be as follows: For one day two dollars; for one week ten dollars; for one month twenty dollars; for three months fifty dollars; for six months one hundred dollars; for one year one hundred and fifty dollars.

SECTION 3. Any person or persons violating this ordinance by selling, canvassing, soliciting or delivering as aforesaid, without having first obtained and paid for a license as required in sections one and two of this ordinance, shall, upon conviction thereof before any magistrate or justice of the peace residing in the said borough,
52 forfeit and pay a fine not exceeding fifty dollars and not less than twenty-five dollars for the use of the Borough aforesaid for each and every offense, together with costs of prosecution; the costs of the magistrate, justice of the peace and constable to be the same as the costs fixed by law for them in similar cases. And any person or persons so convicted and fined, in default of payment thereof, together with the costs aforesaid, shall forthwith be confined in the common jail for the County of Northumberland for a period of not less than fifteen nor more than ninety days, or until such time as the costs and fine imposed, together with the prison charges accrued, be fully paid and satisfied.

SECTION 4. The word "retail," as used in this ordinance, shall be construed to mean in small quantities, such as are usually immediately called for by customers.

SECTION 5. All ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed.

Approved December 9, 1899.

P. H. MOORE,
Chief Burgess.

Endorsement: No. 173 May Sess. 1902 Petition of N. L. Rearick for right to appeal from summary conviction. Order and Dreree within. Filed June 30, 1902 James A. McCarthy, Clerk Walter Shipman Attorney at Law, Sunbury, Pa.

53 *Recognizance of Bail.*

Transcript of Docket of J. P. Carpenter, J. P.

No. 467.

COMMONWEALTH OF PENNSYLVANIA, *Borough of Sunbury:*

Warrant issued April 14, 1902, to J. O. Sterner, Constable, on oath of D. A. Breninghouse, charging that N. L. Rearick, on the 14th day of April, 1902, within the Borough of Sunbury, County of

Northumberland, Pa., sold at retail by sample or otherwise, or solicited orders at retail, and solicited orders for, sold and delivered at retail, upon the streets and by traveling from house to house, foreign or domestic goods, wares and merchandise, not of his own production or manufacture without having first obtained from the Chief Burgess of the Borough of Sunbury a license for such purpose, contrary to an ordinance of said Borough of Sunbury, entitled "An ordinance to provide for the licensing of canvassers, &c. approved Dec. 9, 1899. On June 17, 1902, Defendant brought up Commitment issued for the Defendant. Afterward, Defendant and Walter Shipman each held in the sum of $200 for Defendant's appearance at hearing, June 27, 1902, at 2 o'clock P. M. Subpœna issued for Borough. At proper time, Defendant comes in. John Kunkle, D. A. Breninghouse, C. G. Davis, Minnie Hopple, and William Baylor, sworn for borough. N. L. Rearick sworn for Defendant. Continued to June 28, 1902, at 9 o'clock A. M. From the evidence, and it is so admitted, it appears that the Defendant received goods at Sunbury, Pa., invoiced
54 to himself from the Citizens' Wholesale Supply Company, of Columbus, Ohio, for whom the Defendant is the agent, on or about the 14th day of April, 1902, and at various other times within two years last past. Prior to this time, orders had been taken at retail from various persons in the Borough of Sunbury, for whom the goods so invoiced *was* intended and to whom *it was* delivered. All the goods, though being invoiced and addressed to and received by, the Defendant, had tags placed upon them by the said Citizens' Wholesale Supply Company, of Columbus, Ohio, indicating the persons to whom the said goods should be delivered, and all orders were in separate packages, excepting a number of brooms which were tied up in bundles of one dozen each, which bundles were invoiced to Defendant. As to whether the separate brooms within the bundles were all marked with the names to whom they were to be delivered, the evidence is conflicting. Two witnesses for the Borough swear they were not, and the Defendant swears they were, so marked. Upon this point, the weight of the testimony is with the Borough. It also appears from Defendant's own testimony that the customers had the privilege of examining the goods upon delivery, and thereupon to either accept or reject the same. Whereupon, if rejected, the goods would remain in the custody of, and continue the property of, the Defendant as Agent. The Justice is of the opinion that under the evidence and the law, the Defendant is guilty of violating said ordinance by retailing goods, wares, merchandise, &c., not of their own manufacture, from house to house in the Borough of
55 Sunbury, as charged.

June 28, 1902, Defendant is sentenced to pay a fine of $25 and costs of prosecution, and in default of the payment thereof, stand committed to the county jail for a period of thirty days. Defendant, same day, takes an appeal, and Defendant and Walter Shipman, of Sunbury, Pa., each held in the sum of three hundred dollars for defendant's appearance at the Court of Quarter Sessions of the Peace to be holden in and for Northumberland County at

Sunbury, Pa., the 22nd day of September 1902, and not depart without leave. Costs $17.86 paid by defendant.

I, J. P. Carpenter, hereby certify that the above is a true and correct transcript of the proceedings had before me in the above stated case, so far as the same remains of record upon my docket.

Witness my hand and official seal, July 1, 1902.

[SEAL.] J. P. CARPENTER, *J. P.*

Complaint on Oath of D. A. Breninghouse, before J. P. Carpenter, J. P.

COMMONWEALTH OF PENNSYLVANIA
v.
N. L. REARICK.

BOROUGH OF SUNBURY, *Northumberland County, ss:*

We, N. L. Rearick, and Walter Shipman, of Sunbury, Pa. do acknowledge ourselves to be indebted to the Commonwealth of Pennsylvania, in the sum of Three Hundred Dollars, lawful
56 money of the United States, to be levied of our goods and chattels, lands and tenements, to the use of the Borough of Sunbury, to which payment well and truly to be made to the said Commonwealth of Pennsylvania, we and each of us do bind ourselves, our heirs, executors and administrators, and every of them jointly and severally, firmly by these presents.

Sealed with our seals and dated at Sunbury, Pa., this 28th day of June, A. D. one thousand nine hundred and two (1902)

Now the condition of this obligation is such: That if N. L. Rearick who has been charged with the violation of an ordinance of the Borough of Sunbury, entitled "An ordinance to provide for the licensing of canvassers, &c.," approved Dec. 9, 1899," shall be and appear at the next Court of Quarter Sessions of the Peace to be holden at Sunbury, for the County of Northumberland, on the 22nd day of September, A. D. 1902, then and there to answer any charge or charges that may have been then and there alleged against him and not depart Court without leave, then this obligation to be void, otherwise to be and remain in full force and virtue.

N. L. REARICK. [SEAL.]
WALTER SHIPMAN. [SEAL.]

Taken and acknowledged before me this 28th day of June, A. D. 1902.

[SEAL.] J. P. CARPENTER, *J. P.*

57 COMMONWEALTH OF PENNSYLVANIA,
Northumberland County, ss:

Walter Shipman, being duly sworn says that he resides in Sunbury, Pa., and that he is worth the sum of Three Hundred Dollars, over and above all his just debts and liabilities.

WALTER SHIPMAN.

Sworn and subscribed before me this 28th day of June, A. D 1902.

[SEAL.] J. P. CARPENTER, *J. P.*

NOTE.—If more than one bail write additional affidavit.

Endorsement: No. 173 May Sess. 1902 Borough of Sunbury Commonwealth of Pennsylvania *v.* N. L. Rearick, Recognizance o Bail Filed Jul. 1, 1902 James A. McCarthy, Clark.

Agreed Statement of Facts.

Filed Mar. 9, 1903 James A. McCarthy, Prothonotary

In the Court of Quarter Sessions of Northumberland County.

COMMONWEALTH
v.
N. L. REARICK.

58 Agreed Statement of Facts

It is hereby agreed by and between Counsel for the defendant an counsel for the Plaintiff that the following is a true statement of th facts in this case and that the case be heard thereon.

1. The Citizens' Wholesale Supply Co. is a corporation duly o ganized and existing under the laws of the State of Ohio, located an doing business as grocers in the City of Columbus, in said Stat The business includes the selling of groceries, sundries and oth articles for domestic purposes.

In conducting said business The Citizens' Wholesale Supply C employs agents who, under the direction of said Company, solic orders for groceries, and articles of like character to those abo named by exhibiting samples, in the State of Pennsylvania, an other States of the Union by going personally to residents and cit zens of said States and when necessary from house to house in sa States.

2. J. S. Kunkle, a resident of the State of Pennsylvania, was em ployed by said company to solicit orders for groceries and oth articles in the manner stated.

During the month of March and the early part of April 1902 i pursuance of his employment Kunkle went from house to house i the Borough of Sunbury in said State of Pennsylvania and solicit and took orders for groceries in the manner aforesaid, being suc goods as are usually sold by grocers. After he (said Kunkl
59 had taken a large number of orders for goods said orders we forwarded to the company at Columbus, Ohio, whereupo said Company filled said orders at its place of business in Columbu Ohio, by putting up in packages the proper quantity of each artic ordered to fill said order; for instance, if a particular person order

20 pounds of sugar, 10 pounds of coffee, 10 pounds of prunes, 15 pounds of rice, the company put up in packages 20 pounds of sugar, 10 pounds of coffee, 10 pound- of prunes and 15 pounds of rice. These packages, to fill this particular order, were then placed in one or more boxes, the lids placed on the box or boxes and nailed fast. The name of the agent of the company who was to make the delivery of the packages at Sunbury, and the name of the purchaser of the contents of each box was then stenciled on said box or boxes. For instance, N. L. Rearick was the agent of the company to receive the goods at Sunbury and make the delivery to the purchasers while Mrs. Dan Dailey was a purchaser. In such case the goods ordered by Mrs. Dan Dailey would be placed in one or more boxes, said boxes closed as aforesaid and marked as follows:

N. L. Rearick, Sunbury, Pa.

For Mrs. Dan Dailey. "7"

The "7" at the lower right hand corner is intended to indicate to the agent the number of Mrs. Dan Dailey's order and was placed there for the purpose of preventing mistakes and facilitating delivery. If Mrs. Dan Dailey's goods were packed in more than
60 one box each would be marked as above shown. All other boxes for other purchasers were similarly marked. All goods were packed and marked in the manner just described with the exception of brooms. The orders for brooms were filled in the following manner: for instance, if one man, say John Smith, ordered one broom which was included in his order for other goods, a broom was selected at the place of business of said Company in Columbus, Ohio, to fill said order and a tag was marked in the following manner and tied by a string to the handle of said broom:

To N. L. Rearick, Sunbury, Pa.

For John Smith, 1 broom 4

From the Citizens Wholesale Supply Co. 366 to 376 Mt. Vernon Av., 290 to 310 N. Grant Av., Columbus, Ohio.

If John Smith or any other customer ordered more than one broom the "1" before the word broom on the tag was changed to the number ordered and the tag tied to a string which was wrapped around and tied to the handles of all the brooms ordered by that customer. All brooms ordered by the several purchasers were selected to fill the order and tagged in a similar manner to that just described. The brooms were then aggregated together in bundles of a dozen each, or some such number, a paper wrapped around the straw part, and around the paper and the bundles a twine was wound and tied to keep the bundle together. The brooms were tied in bundles solely

for convenience in shipment. The brooms and the boxes
61 above described were then shipped from Columbus, Ohio by said Company, over the Pennsylvania Railroad to its agents, N. L. Rearick at Sunbury, Pa.

The said Company kept no book accounts with the several persons from whom orders were taken other than those kept upon the sheets hereto attached, copies of which are made in a letter press copying book of the company, and extended no credit to such persons from whom orders were taken, the goods being sold for cash to be paid for upon delivery at the residences of the several purchasers. All goods shipped in pursuance of said orders were shipped to N. L. Rearick for delivery and he was held responsible therefor. These goods were consigned to N. L. Rearick and he alone had authority to obtain the same from the Railroad Company, the common carrier. The original orders referred to in the beginning of this paragraph, an original one of which is attached to this statement of facts, were forwarded by the parties taking the orders to the Company at Columbus, Ohio, and after the orders had been filled, re-forwarded by them, to N. L. Rearick in this case, at Sunbury, Pa., and after delivery had been made by N. L. Rearick these orders and order sheets were returned by him to the Company where they were kept on file for future reference, in connection with other data on the same subject.

3. N. L. Rearick is a citizen of the United States and of the State of Pennsylvania, and is a general agent on a fixed salary of
62 the said The Citizens' Wholesale Supply Co. He has under his charge the agents of said company located in a certain portion of the State of Pennsylvania. The Borough of Sunbury is in his district. It is his duty, among other things, to make delivery of the goods shipped by his principal said company, into his district to fill orders previousy taken by other agents In discharge of his duty he went to the Borough of Sunbury, Pa., to make delivery on the 14th day of April 1902, of the goods to fill the orders taken by J. S. Kunkle as above described. At Sunbury he received the car of goods from Columbus, Ohio. The defendant opened the car and with the assistance of the said J. S. Kunkle delivered the goods to the purchasers at their residences in the following manner:

The boxes marked for persons living in a selected locality were taken from the car and placed in a wagon. J. S. Kunkle, in company with N. L. Rearick then took the wagon with the goods to a selected locality and stopped at the houses of the respective purchasers. At the house of each purchaser said Kunkle took from the wagon such boxes as were marked for such purchaser and delivered them to him and received from said purchaser payment therefor. This he did at the houses of all persons who had ordered goods from him as aforesaid. The money collected by Kunkle was turned over by him to the defendant, N. L. Rearick, who, after completion of the delivery, sent the money to his principals said Company at Columbus, Ohio.

4. On opening the car to make said delivery the defendant, N. L. Rearick, cut the twine that bound the brooms together in
63 bundles and unwrapped the paper from the same. The brooms were then delivered in the same manner and at the

same time as the boxes, each purchaser receiving the broom that had been marked for him and appropriated to his order in Columbus, Ohio, as above described.

5. No broom nor box was delivered to any one but the person who had ordered it and for whom it was marked.

6. The orders taken by said Kunkle had endorsed upon them respectively the name and address of the purchaser. The orders were numbered in the order in which they were taken. A copy of the order was left with each purchaser. Under the contract each purchaser had the right to examine the goods when delivered and if the same was not equal to the samples shown by Kunkle at the time the order was taken could refuse to accept them. Said Kunkle took orders for goods, an original one of which orders is hereto attached, made part hereof and marked Exhibit "D." Said orders show that they were given to the Citizens' Wholesale Supply Co. of Columbus Ohio.

No goods were shipped to N. L. Rearick at Sunbury, Pa. by said Company from Columbus, Ohio, except to fill the orders taken by Kunkle, as aforesaid. And no goods were shipped in any other manner than as above described nor from any other place than Columbus, Ohio. And all boxes and brooms were marked as above described.

No box was opened by said defendant or any one for him
64 after its arrival within the State of Pennsylvania before the same was delivered to the purchaser, unless for the purpose of inspection only by the purchaser as provided in the contract of purchase, to see if the goods were equal to the sample shown by Kunkle when he took the order.

7. N. L. Rearick, the defendant, was the agent of said Company *inter alia* for the purpose of receiving these goods at the railroad station and delivering them to the several parties who had previously ordered them, and receive the money therefore. He was held responsible to the company for all goods so entrusted to his custody and it was his duty to receive payment and send the money to the Company. If for any reason any goods were not delivered it was his duty to return the same to the company at Columbus, Ohio.

8. Rearick, the defendant, was engaged in delivering goods in the manner aforesaid in the Borough of Sunbury, Pa. on the 14th day of April 1902.

9. The Borough of Sunbury is a municipal corporation of the State of Pennsylvania, organized under a special Act of the General Assembly of the State of Pennsylvania, approved March 24, 1797, and the several supplements thereto, and has in force an ordinance approved December 9, 1899, a true and correct copy of which is hereto annexed and made a part hereof, and marked Exhibit A. The said Rearick is charged with violating Section I of the said Ordinance.

65 10. At and prior to the time of his arrest the said Rearick had not been selling or offering for sale any goods, wares or merchandise in any other place or manner than has hereinbefore been specified and he has not been guilty of any violation of said

ordinance unless the facts as hereinbefore stated constitutes a violation. In making such deliveries he did not offer nor deliver any goods except those ordered, nor to any other person or persons than those who had ordered goods as aforesaid and to them he delivered only the goods ordered. The goods were in Sunbury for delivery to the purchasers in pursuance of their orders taken by said Kunkle in March and the early part of April previously. The goods were there for no other purpose than as aforesaid.

11. Rearick, the defendant, at the time he delivered the goods as aforesaid and at the time of his arrest was not delivering goods at wholesale, that is, to dealers, nor was he delivering goods of his own production or manufacture or the production or manufacture of his principal, said company, and he did not have license of any kind permitting him to deliver goods by retail or otherwise in said Borough of Sunbury.

12. On the 14th of April, 1902, the defendant, while engaged in delivering goods as above described, was arrested and carried before one J. P. Carpenter a Justice of the Peace in and for Northumberland County in the State of Pennsylvania. The said arrest was made by virtue of a warrant issued under an information which
66 charged the defendant with a violation of the ordinance of said Borough above described, and a copy of which is attached hereto and made part hereof and marked Exhibit A. That on the 28th day of June 1902 a trial before said Justice of the Peace was had of said charge and said Justice of the Peace rendered his decision on the 29th day of June 1902 and sentenced the defendant to pay a fine of $25 and costs or to stand committed to the Jail of the County of Northumberland, which is the Jail at Sunbury, for a period of thirty days and until said fin*d* and costs were paid. That the defendant refused to pay said fine and costs and from said decision appealed to the Court of Quarter Sessions in and for the County of Northumberland aforesaid and entered bail for his appearance at such Court of Quarter Sessions.

13. If the Court should be of the opinion upon the facts stated that the defendant Rearick was guilty of a violation of said Ordinance of December 9, 1899, then the judgment of the Justice of the Peace imposing a fine of $25 upon the defendant, is to be affirmed. If the Court should be of the opinion that Rearick has not violated the provisions of said Ordinance or that said Ordinance is, so far as he is concerned, illegal or unconstitutional then judgment of "Not guilty" is to be rendered in favor of the defendant. In either case each party reserves the right to sue out a writ of error or take other appeal from said judgment.

HARRY S. KNIGHT, *For Com'th.*
MAX L. MITCHELL,
Counsel for Def't.

67 *Request for Findings of Conclusions of Law.*

In the Court of Quarter Sessions of Northumberland County.

No. —.

COMMONWEALTH
v.
N. L. REARICK.

Counsel for Defendant respectfully ask the Court to find the following conclusions of law:

1. All of the acts of the defendant complained of as illegal in this case and for which he was arrested under the provisions of the ordinance of the Borough of Sunbury approved December 9, 1899, which ordinance is recited in the statement of facts agreed upon, were done in carrying on interstate commerce, and the arrest of the defendant is illegal and void because the ordinance above referred to, so far as it applies to the defendant, is in restraint of interstate commerce and is therefore a violation of Clause 3, section 8 of Article I of the Constitution of the United States which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the different States and with the Indian tribes."

Refused. *Per Cur.*

2. The arrest of the defendant is illegal and void because the ordinance of December 9, 1899, so far as the defendant is concerned, is in restraint of trade. It abridges the right, freedom and liberty of contract and for that reason violates Section I of the

68 Fourteenth Amendment of the Constitution of the United States which provides "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Refused. *Per Cur.*

3. The arrest of the defendant is illegal and void because so far as the defendant is concerned, the ordinance of December 9, 1899 is unconstitutional in that it discriminates between persons and denies the equal protection of the laws. It gives rights, privileges and immunities to some which it denies to others. It is in violation of the last clause of Section I of the Fourteenth Amendment to the Constitution of the United States which provides that "No State * * * shall deny to any person within its jurisdiction the equal protection of the laws."

Refused. *Per Cur.*

Endorsement: Filed Mar. 9, 1903 J. A. McCarthy, Clerk.

69 *Opinion of Court of Quarter Sessions.*

In the Court of Quarter Sessions of Northumberland County, 1903.

No. —.

COMMONWEALTH
vs.
N. L. REARICK.

Opinion.

By the COURT:—This case reaches us on an appeal from the judgment of the Justice of the Peace, before whom the defendant was summarly convicted, for violation of an ordinance of the borough of Sunbury, this county. The facts have been agreed upon by counsel for the respective parties and we are, therefore, necessarily limited in our consideration to the data thus furnished.

The Citizens Wholesale Supply Company is an Ohio corporation, having its place of business in the city of Columbus, that State. Its business includes the sale of groceries, sundries and other articles for domestic purposes. In the conduct of its business it employs agents who, under the direction of the Company, solicit orders for groceries and other articles, by going personally to residents and exhibiting samples of their wares and soliciting orders for the sale of the same. J. S. Kunkel, a resident of this State, acted as such agent for the company, and in March and April, 1902, went from house to house in the borough of Sunbury and solicited and took orders for groceries, brooms, etc. The orders thus taken were forwarded to the Company, where the said Company filled these orders by putting in packages the proper quantity of each article ordered. All of the articles ordered by any one person, except brooms, were placed in one or more boxes, the lids of which were nailed fast. The articles intended for one person were in no instance placed in
70 a box containing articles for another. The name of the agent of the Company, who was to make the delivery of the package at Sunbury and the name of the purchaser of the contents of each box, was stencilled on the box.

The defendant, Rearick, was the agent of the Company to receive the goods at Sunbury and make delivery to the purchasers. For instance, goods purchased by Mrs. Dan Dailey were placed in one or more boxes, the boxes closed and marked as follows: "N. L. Rearick, Sunbury, Pa., for Mrs. Dan Dailey, 7." The figure "7" indicated to the agent the number of Mrs. Dan Dailey's order and was placed there for the purpose of preventing mistakes and facilitating delivery. All other boxes, for other purchasers, were similarly marked. Orders for brooms, however, were filled in the following manner; If one man, say John Smith, ordered one broom, which was included in his other order for other goods, a broom was selected at the place of business of said Company in Columbus to fill said order and a tag was marked in the following manner and tied by string to the

handle of said broom: "To N. L. Rearick, Sunbury, Pa., for John Smith, one broom, 4, the Citizens' Wholesale Supply Company, 336 to 376, Mount Vernon Avenue; 290 to 310 N. Grant Ave., Columbus, Ohio." If Smith, or any other customer ordered more than one broom the "1" before the word broom on the tag was changed to the number ordered and the tag tied to a string, which was wrapped around and tied to the handles of all the brooms ordered by that customer. All brooms, ordered by the several purchasers, were selected to fill the order and tagged in a similar manner to that just described. The brooms were then aggregated in bundles of 1 dozen each, or some such number, a paper wrapped around the straw part and around the paper and the bundles a twine was wound and tied to keep the bundle together. The brooms were tied solely for the
71 convenience in shipping. The brooms and the boxes, above described, were then shipped from Columbus, Ohio, by said Company over the Pennsylvania Railroad to its agent, N. L. Rearick, at Sunbury, Pennsylvania.

The Company kept no book accounts with the several persons from whom orders were taken, other than the order sheets themselves and extended no credit to such persons from whom the orders were taken, the goods being sold for cash to be paid for upon delivery at the residences of the several purchasers. All the goods shipped, in pursuance of said orders, were shipped to N. L. Rearick for delivery and he was held responsible therefor. They were consigned to Rearick and he alone had authority to obtain the same from the carrying railway company.

The orders taken by the saliciting agent were forwarded by the agent to the company, at Columbus, and after being filled were reforwarded by the company to Rearick, at Sunbury, and after delivery of the goods by Rearick were returned by him to the Company at Columbus.

Rearick is a citizen of the United States and state of Pennsylvania and is a General Agent at a fixed salary for the said supply company. As such agent it is his duty, among other things, to make the delivery of the goods shipped by said company into his district for the purpose of filling orders previously taken by the soliciting agent. In the discharge of his duty on the 14th of April, 1902, he received at Sunbury, a car of goods from Columbus, Ohio, opened the car and with the assistance of J. S. Kunkel, the soliciting agent, delivered the goods to purchasers at their residences, in the said borough, in the following manner: The boxes marked for persons living in a selected locality were taken from the car and placed in a wagon, Kunkel in company with Rearick then took the
72 wagon with the goods to a selected locality and stopped at the houses of the respective purchasers. At the house of each purchaser Kunkel took from the wagon the boxes marked for such purchaser and delivered them and received from such purchaser payment therefor. The money collected by Kunkel was turned over by him to the defendant, who, after the completion of the delivery, sent the money to his principals at Columbus. On opening the car, for the purpose of making delivery, the defendant

cut the twine that bound the brooms together in bundles and unwrapped the paper from the same. The brooms were then delivered in the same manner and at the same time as the boxes, each person receiving the broom or brooms that had been marked for him and appropriated to his order in Columbus, as above described. The boxes and brooms were delivered only to those who had ordered them. Each purchaser had a right to examine the goods when delivered and if the same was not equal to the sample, shown by the soliciting agent, at the time the order was taken, could refuse to accept them. The orders show that they were given by the Citizens Wholesale Supply Company, of Columbus, Ohio. No goods were shipped to the defendant by the company except to fill the orders taken by Kunkel.

The defendant, while engaged in delivery — goods, as above described, was arrested and was taken before a justice of the peace, charged with a violation of an ordinance of the borough of Sunbury and, after a trial before said justice, was sentenced to pay a fine of twenty-five dollars and costs, or stand committed to the jail of the County of Northumberland for a period of thirty days until the said finding and costs were paid.

The ordinance, under which the defendant was convicted, was approved December 9, 1899, and is entitled "An Ordinance,
73 To provide for the licensing of canvassers and all other persons who sell at retail, by sample or otherwise, or who solicit orders at retail, or who solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise or fruits, not of their own production or manufacture, and imposing a penalty for a violation of this ordinance."

The first section provides that "It shall be unlawful for any person or persons to sell at retail, by sample or otherwise, or to solicit orders at retail, or to solicit orders for, sell or deliver at retail, either on the street or by traveling from house to house within the limits of the borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandize or fruits not of their own production or manufacture without having first obtained from the Chief Burgess of the borough of Sunbury a license for such purpose."

The second section fixes the prices of said license as follows; "For one day two dollars; for one week ten dollars; for one month twenty dollars; for three months fifty dollars; for six months one hundred dollars; for one year one hundred and fifty dollars." The third section provides the penalty for the violation of sections one or two. The fourth section defines the word retail as meaning small quantities, such as are usually immediately called for by customers.

We confess our inability to harmonize some of the decisions of the Federal Courts, in cases involving the same principle as are involved in the facts before us, with the decisions of the Appellate Courts of our own state.

74 In the Spain case, reported in the 4th Volume of the Federal Reporter, at page 208, Judge Bond, of the Circuit Court,

E. D. North Carolina, held, that where manufacturers of household goods of West Virginia sent their agents into North Carolina to sell goods by sample on the installment plan, the goods to be delivered to each purchaser by the agent afterwards, the fact that the goods were to be delivered by the agent does not make him liable to pay a tax as a peddler, as prescribed by the laws of that state. In that case the method of the agent was to carry samples from door to door and the householder, or purchaser, ordered such articles as he desired by written order direct from the manufacturer, at Charleston, West Virginia. When the purchaser's orders reached Charleston the variety of household articles were all packed in one or more boxes and were consigned to the agents, who took the orders to be by them delivered. The case was before the Court on an application for a writ of *habeas corpus*. There was no dispute about the facts. The Court held that the petitioner was engaged in interstate commerce; that the defendants had a right to sell and that the right to sell implies the obligation and right to deliver, that it is as much interstate commerce to do the one as the other, and that the Act of Assembly was unconstitutional as to citizens of other states because it was an attempt to regulate interstate commerce.

The same question was before Judge Reed, of the Circuit Court of the Western District of Pennsylvania, on petition of William Tyreman for a writ of *habeas corpus* to release him from imprisonment for the violation of an ordinance, in the city of Titusville, Pa., by delivering books sold by book canvassers. Tyreman was employed by a citizen of the state of New York, and doing business
75 in the city of New York, to deliver books sold by one Nichols and to collect the price therefor. These books had been sent to Tyreman from his principal's branch store room, or office, in the city of Pittsburg and he was arrested while engaged in his employment for failure to obtain a license, as required by an ordinance of the city of Titusville. Judge Reed says: The precise question was decided in favor of the petitioner, in the case of Spain, 47 Federal Reporter, 208 and affirms the principle that the right to sell implies the obligation and the right to deliver and that it is as much interstate commerce to do the one as the other.

A different view, however, seems to be taken and held by our Superior Court, in the case of New Castle *vs.* Cutler, 15 Superior Court 612, where the facts resemble, in many aspects, those of the case at bar. In that case a resident and citizen of Pennsylvania, representing a firm of grocers doing business in Ohio, went from house to house taking orders for the delivery of a few pounds of coffee or prunes, or a small number of brooms or bars of soap. It was arranged between the salesman and his firm that the orders should be taken for such quantities of goods that they could fill by delivering the coffee in two pound packages and the prunes in five pound packages, and not less than twenty-five bars of soap or three brooms were to be sold to any one purchaser. The goods were shipped in one car. The packages of coffee and prunes were placed in a box without lids. The soap was packed in boxes containing fifty bars each, and the brooms were tied in bundles to equal the aggregate

amount of all the orders. None of the packages were marked with the name of the purchaser, but were consigned to the firm. When the car arrived at its destination, a member of the firm delivered the goods to the salesman, who loaded the goods on a wagon and
76 delivered them to the purchasers. In making this delivery, the packages of two pounds of coffee and five pounds of prunes were not opened, but the bundles of brooms were untied to fill orders. Boxes of soap were opened when only twenty-five bars had been ordered. The city in which these deliveries were made, enacted an ordinance imposing a license tax on peddlers and persons travelling from house to house with goods for sale and on persons soliciting orders for goods, held

"1. That the ordinance was not repugnant to the interstate commerce clause of the constitution of the United States.

2. That the goods brought from Ohio had become incorporated and mixed with the mass of property in this state, and that the commerce in them had become the domestic commerce of Pennsylvania.

3. That the device of placing the small packages of coffee and prunes in large open boxes was a mere device to evade the laws of Pennsylvania.

4. That the salesman was liable for the license tax under the ordinance."

The point of difference, and one which may be important, between that case and one at bar, is, that in the Cutler case none of the packages were marked with the name of the purchaser but were consigned to the firm, while in the case at bar the boxes were consigned to the defendant, had his name stencilled thereon and also marked "for" purchaser.

The Supreme Court of the United States have decided in a number of cases, that a citizen of one state may sell his goods within the boundaries of another state and if the doctrine, that the right to sell implies the right and obligation to deliver is sound, it is difficult to see or understand why the conviction in New Castle *vs.*
77 Cutler could have been sustained. However, we feel bound to follow the authority of that case, as we understand it. There is nothing in the case to show that any of the goods were delivered in the original packages. The goods were shipped in one car but the packages of coffee and prunes were placed in boxes without lids; the soap was packed in boxes containing fifty bars each, while the brooms were tied in bundles to equal the aggregate of all the orders taken. In the present case the goods were shipped in the same car, each purchaser's groceries were placed in the box or boxes, designated with his name and number, and were delivered in the identical condition in which they were shipped, with the exception that the purchaser had the right of inspection before acceptance, which he could do by simply removing the lid or lids. This, in our judgment, was not a breaking of the original package and the goods thus delivered were, in our judgment, subjects of interstate commerce. A different method was adopted for the delivery of brooms. These had been aggregated in bundles of twelve or more

at Columbus. Each purchaser's broom was tagged with his name and when they reached Sunbury the bundles were opened and the purchaser's brooms taken therefrom as they were needed for delivery. This, we believe, was a breaking or destruction of the original package. Before delivery, therefore, they ceased to be subject of interstate commerce and became mingled with the common mass of property of the state and, therefore, subject to the laws and ordinances of the Commonwealth. While they had in a certain manner been designated, at Columbus, as property to be delivered to the persons whose names were on the respective tags and were delivered to the railroad company as a common carrier, yet they remained in the custody and control of the supply company, or their agent, the
78 defendant. The title to the brooms did not pass to the person who had ordered them until delivery at his home, and had been, by him, inspected and paid for. If the purchaser refused to accept or pay for his purchases the defendant's duty was to return the refused articles to his principals at Columbus. The place of sale, therefore, of these articles was the borough of Sunbury.

Being of the opinion that the defendant is guilty of a violation of said ordinances, in the sale of brooms as above described, the judgment of the justice of the peace, imposing a fine of twenty-five dollars and costs upon the said N. L. Rearick, is affirmed.

July 6, 1903.

VORIS AUTEN,
A. L. J. [SEAL.]

Same day an exception is noted and bill sealed for the defendant.

VORIS AUTEN,
A. L. J. [SEAL.]

Endorsement: No. 173 Mar. 1902 Quarter Sessions of Northumberland County. Commonwealth *v.* N. L. Rearick. Opinion of the Court July 9, 1903 filed J. A. McCarthy, Clark.

79 EXHIBIT "D."

Form 113—2-25-'01—1,000,000.

Sale No. 3. The Citizens' Wholesale Supply Company, Columbus, Ohio. $1.01.

L. $2.96. GENTLEMEN: Please ship me the following bill of goods ordered from your Salesman: R. $11.12.

Quantity.	L.	Amount.	Quantity.	R Bulk goods packed in 5, 10, 15, 20, 25 lb. Sizes.	Amount.
	Natural Leaf Tea		10	Roasted Gold R. Blend Coffee.	2.75
	Bask. Fired Jap. No. 1			" O. G. Java Blend	
	Uncol. Jap. No. 1			" African Java Blend	
	Young Hyson No. 1			" Old Govt. Java	
	Gunpowder No. 1			" African Java	
	Eng. Breakfast No. 1		1	Coffee Mill	.05 .34
	Oolong No. 1			Rosted Golden Rio	
	Ceylon No. 1			Axle Grease Golden Rule	
2	Baking Powder	.78	1	Celery Salt	.06 .25
	Pepper, Cayenne, Ground			Pepper, White, Ground	
	Allspice, Ground		2	" Black "	.06 .46
	Cloves "			Black Leather Dressing	
1	Cinnamon "	.56		Combination Tan Polish	
	Ginger Jam "			" Dressing & Polish	
	Mustard "			Patent Leather Polish	
	Mixed Spice "			French Blacking	
	Sage "			Furniture Polish	
	Nutmegs			Metal Polish	
	Citron			Silver Polish	
½	Vanilla Extract	.90		Stove Polish	
	Lemon "			Carpet Cleaner	
	Orange "			Cleaning Compound	
	Jam. Ginger "			Olive Oil	
	Celery "			Castor Oil, Pure	.11
	Almond "				
	Cream Tartar		1	Sugar H. Syrup	.59
	Cocoanut			Quinine	
	New Orleans Molasses		1	Cocoa, Cleveland	.04 .45
	Syrup R. C			Chocolate Sweet	
	Sewing Machine Oil		1	" Unsweetened	.04 .39
	Bicycle Lub. or Illum. Oil			Brooms—Our Special	
	Harness Oil			Bushel Baskets	
	1,000 Mile Axle Oil			Clothes Baskets	
	Engine Oil			Hampers	
	Sani-Tari Skin Soap			Market Baskets	
	Sapo de Castillio			Lye, Concentrated	
	Glycerine Soap			Bees Wax	
	Distilled Pine Tar Soap			Macaroni	
	Cold Cream			Spaghetti	
	Camphor Ice			Vermicelli	
	Glycerine, Pure		1	qt. Prepared Mustard	.01 .13
	Hazeline			Mason Jars, Quarts	
	Witch Hazel			Cigars	
	Hair Tonic			Stogies	
	Petrolatum, Prep. or Plain		5	Prunes, California Silver	.03 .65
	Rose Geranium Jelly		5	Peaches Fcy. Evaporated	.05 .85
	Shampooing Liquid				
	Tooth Powder				
	Toilet or Face Powder				

80

Quantity.		Amount.
	Lilac Salts	
	Perfumes Imp. and Domestic	
	Toilet Waters Imp. and Dom.	
✓ 1	Bluing Liquid	.33
	Box Blue	
	Ball Blue, Diamond	
	Indigo	
	Aqua Ammonia	
	Laundry	
✓ 6	6 lb. Gloss Starch No. 1	.39
	Sulphur No. 1	
	Sealing Wax	
	Sarsaparilla	
	Old Colony	
	Ink	

Quantity.		Amount.	
	Apricots California		
	Evaporated		
✓ 5	Raisins, Seeded No. 1	.03	.53
	Currants Eng. 1 lb. packs		
✓ 1	Corn Starch 1 lb. packs	.01	.07
5	Tapioca, Pearl	.03	.28
✓	" Granulated		
	Rice, Pearl, Japan		
	Sago		
	Rolled Oats		
✓ 1	Corn Only Cream	.07	1.25
	Barley, Pearl		
	Beans		
	Hominy, Flake		
	Can Opener		
	Tack Puller		
✓ 1	Bag salt table		.04
	Uncle Sam's Tar Soap		
✓ 1	Soda A. & H		.05
1	Crackers Carton E. B	.02	.24
4	5-lb. Bags Granulated Sugar		1.07
✓ 20	Off A Sugar		.95
	Total Amount		$14.08

Goods Shipped to be as Good as Sample Shown by Salesman.
Name, Mrs. C. A. Byerley
Postoffice Sunbury, Pa.

Endorsement.

If customer resides in country be sure to fill in below, otherwise collector cannot find if delivery notice should miscarry.
Direction from town ——.
Distance " " ——.
On direct road from town or X road ?
81 If X road, state direction from main road, and how far ——.
Local name of road on which customer resides ——.
Remarks : ——.
Collector will see that below is always filled out if any deductions.

Total Amount of Order.				
Should any article fail to deliver, itemize below.				
Total.....				
Should any articles be short, itemize below.				
Total.....				
Itemize below any other deductions.				
82 Total.....				
Total Deductions.....				

Balance paid
Of which is L $—— and R $——
Original Amount of C $——
Less Deductions, $——
True Amount, $——
Aggregated
Notified

No. 12 Date Mar. 12, 1902 Amount $14.08. Name Mrs. C. P. Byerly St. and No. Market Postoffice Sunbury, Pa. Delivery Point Residence Salesman J. S. Kunkle

When paid Collector will mark above "Paid" (stating how much), signing with his initials. (See Back Inside.)

83 EXHIBITS.

"EXHIBIT A."

COMMONWEALTH OF PENNSYLVANIA,
County of Northumberland, Borough of Sunbury, ss:

Before me, the subscriber, one of the Justices of the Peace in and for said County, personally came D. A. Breninghaus, who, being duly sworn according to the law, doth depose and say that N. L. Rearick on the 24th day of April, 1902, within the Borough of Sunbury in Northumberland County, Pennsylvania, sold at retail, by sample or otherwise, or solicited orders at retail and solicited orders form sold and delivered at retail, upon the streets and by traveling from house to house, foreign or domestic goods, wares and merchandise not of his own manufacture, without first having obtained from the Chief Burgess of Sunbury Borough, a license for such purpose, contrary to the ordinance of said Borough of Sunbury entitled "An Ordinance to provide for the licensing of canvassers, etc." approved December 9, 1899, and further saith not.

(Signed) D. A. BRENINGHAUS.

Sworn and subscribed before me this 14th day of April, 1902.
(Signed) J. P. CARPENTER.

EXHIBIT "B."

An Ordinance To provide for the licensing of canvassers and
84 all other persons who sell at retail, by sample or otherwise, or who solicit orders at retail, or who solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the Borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise or fruits, not of their own production or manufacture, and imposing a penalty for a violation of this ordinance.

SECTION 1. Be it enacted and ordained by the Borough of Sunbury, in town council assembled, and it is hereby enacted and ordained by the authority of the same, that after the passage of this ordinance it shall be unlawful for any person or persons to sell at retail, by sample or otherwise, or to solicit orders at retail, or to solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the Borough of Sunbury, any books, paintings; foreign or domestic goods, wares, merchandise or fruits, not of their own manufacture or production, without first obtaining from the Chief Burgess of the Borough of Sunbury a license for such purpose.

SECTION 2. The license fee required to be paid under this ordinance shall be as follows: for one day two dollars; for one week ten dollars; for one month twenty dollars; for three months fifty

dollars; for six months one hundred dollars; for one year one hundred and fifty dollars.

SECTION 3. Any person or persons violating this ordinance by selling, canvassing, soliciting or delivering as aforesaid, without first — obtained and paid for a license as required in sections one and two of this ordinance, shall, upon conviction thereof before any Magistrate or Justice of the Peace residing in the said Borough, forfeit and pay a fine not exceeding fifty dollars and not less than twenty-five dollars, for the use of the Borough aforesaid, for each and every offense together with costs of prosecution; the costs of the Magistrate, Justice of the Peace and Constable to be the same as the costs fixed by law for them in similar cases. And any person or persons so convicted and fined, in default of payment thereof together with costs aforesaid, shall be forthwith confined in the common jail for the County of Northumberland, for a period of not less than fifteen and not more than ninety days, until such time as the costs and fine imposed, together with the prison charges accrued, be fully paid and satisfied.

SECTION 4. The word "retail" as used in this ordinance shall be construed to mean in small quantities, such as are usually immediately called for by customers.

SECTION 5. All ordinances or parts of ordinances inconsistent herewith be and the same — hereby repealed.

Approved December 9, 1899.

P. H. MOORE,
Chief Burgess.

EXHIBIT "C."

Return this Sheet.

The Citizens Wholesale Supply Company, Columbus, Ohio.

Orders No. 1 to No. 46, inclusive, sold by J. S. Kunkle for Delivery at Sunbury, Pa., on April 14 & 15, 1903.

No.	Tax.	L.	Drayage.	C.	R.	Total.
1	.....	67	.....	03	90	157
2	.....	.....	.....	26	335	335
3	.....	.....	.....	14	233	233
4	.....	182	.....	29	736	518
5	.....	.....	.....	11	268	268
6	.....	173	.....	21	758	931
7	.....	.....	.....	08	84	84
8	.....	....	.....	09	327	327
9	.....	178	.....	34	647	825
10	.....	38	.....	21	305	343
11	.....	72	.....	20	339	411
12	.....	296	.....	101	1112	1408
13	.....	117	.....	41	386	503
14	.....	122	....	13	88	210

15	.....	.....	.....	50	374	374
16	.....	90	.....	14	190	280
17	.....	.....	....	39	419	419
18	.....	47	....	23	300	347
19	.....	279	.....	28	475	754
20	.....	39	.....	10	244	283
21	.....	165	.....	12	195	360
22	.....	90	.....	52	398	488
23	.....	220	.....	32	671	891
24	.....	393	....	65	447	840
25	.....	97	.....	06	215	312
26	.....	61	.....	20	335	396
27	.....	131	.....	75	583	714
28	.....	75	....	11	156	231
29	.....	38	.....	....	281	319
30	.....	35	.....	27	499	534
31	.....	743	.....	42	358	1101
32	....	.....	.....	40	275	275
33	.....	78	....	09	353	431
34	.....	.....	.....	05	74	74
35	.....	155	.....	71	623	778
36	.....	56	....	25	176	232
37	.....	.....	.....	13	203	203
87						
38	.....	135	.....	44	627	762
39	.....	164	.....	59	438	602
40	.....	480	.....	88	860	1340
41	.....	.....	.....	08	126	126
42	.....	375	.....	66	544	919
43	.....	422	.....	34	305	727
44	.....	.....	.....	04	106	106
45	.....	236	.....	32	481	717
46	.....	275	.....	09	39	314
	Forward...	6124		1364	17078	23202

Endorsement on this sheet.

Form 107—100000—1-19-'01.

$—. ——, —— —, 19—.

Received of Citizens Wholesale Supply Company, per —— —— Collector, — dollars in full of commissions due on orders sold and delivered as per list on opposite side of this sheet.

—— ——.

(In pencil:) Sunbury, Pa. 4-14-'02 20.

Return this Sheet.

The Citizens Wholesale Supply Company, Columbus, Ohio.

Orders No. 47 to No. 68, inclusive, sold by J. S. Kunkle for Delivery at Sunbury, Pa., on Apr. 14 & 15, 1902.

No.	Tax.	L.	Drayage.	C.	R.	Total.
		6124	.....	1364	17078	23202
47	.....	158	.....	28	322	480
48	.....	294	.....	19	174	468
49	.....	33	.....	13	190	223
50	.....	109	.....	02	24	133
51	.....	.....	.....	18	214	214
52	.....	342	.....	01	146	488
88						
53	.....	57	.....	14	138	195
54	.....	33	.....	29	365	398
55	.....	131	.....	22	315	446
56	.....	95	.....	12	587	682
57	.....	.....	.....	24	253	25
58	.....	215	.....	17	107	322
59	.....	223	.....	33	294	517
60	.....	.....	.....	40	275	275
61	.....	395	.....	63	603	998
62	.....	118	.....	38	310	428
63	.....	206	.....	47	375	581
64	.....	266	.....	26	229	495
65	.....	165	.....	18	283	448
66	.....	.....	.....	21	200	200
67	.....	108	.....	04	83	263
68	.....	57	.....	11	256	313
		9201	.....	1864	22821	32022
		30				
		276030				
		1864				
		4624				

Endorsement.

Form 107—100000—1-19-'01.

$46.24. SUNBURY, PA., *April* 15, 1902.

Received of Citizens Wholesale Supply Company, per N. L. Rearick Collector 46 24/100 dollars in full for commissions due on orders sold and delivered as per list on opposite side of this sheet.

J. S. KUNKLE.

89 *Certificate of Clerk of Quarter Sessions.*

COMMONWEALTH OF PENNSYLVANIA, *County of Northumberland, ss:*

[SEAL.]

I, James A. McCarthy, Clerk of the Court of Quarter Sessions of the Peace in and for said County, do hereby certify that the foregoing is a fully, true and correct copy of the whole Record of the case, Commonwealth *vs.* N. L. Rearick, so full and entire as the same remains of Record before the said Court, at No. 173 May Sessions A. D. 1902.

In Testimony whereof, I have hereunto set my hand and affixed the Seal of said Court this 4th day of August A. D. 1903.

JAMES A. McCARTHY, *Clerk.*

90 STATE OF PENNSYLVANIA, *County of Northumberland, ss:*

Among the Records and proceedings enrolled in the Court of Quarter Sessions of the Peace, in and for said County, to No. 173, May Sessions, 1902, *in re* Petition of N. L. Rearick for right to appeal from summary conviction, is contained the following:

Copy of Quarter Session Docket Entry.

In re Petition of N. L. REARICK for Right to Appeal from Summary Conviction. 173.

Walter Shipman.

June 30, 1902 Petition of N. L. Rearick praying the Court for the reasons set forth therein to grant him the right of appeal from the Summary conviction before J. P. Carpenter, Justice of the Peace aforesaid presented. And now, June 30, 1902, the foregoing petition read, and after due consideration an appeal is granted to the Petitioner as prayed for in the petition. The bail to be fixed for such appeal to be within the discretion of the Justice before whom the summary conviction was had. By the Court, Voris Auten, A. L. J., July 1, 1902, Transcript from Docket of J. P. Carpenter, J. P., and Recognizance in the sum of Three Hundred Dollars, with Walter Shipman as surety, filed. Jan. 26, 1903, continued P. C. Feb. 23, 1903, continued P. C.

91 Mar. 9, 1903, argued. Statement of facts filed. Same day Defendant's conclusion of law filed. March 23, 1903, Argued and C. A. V. July 9, 1903, Opinion of Court and answers to the Defendant's request for conclusions of Law, filed. The judgment of the Justice of the Peace imposing a fine of $25.00 and costs upon N. L. Rearick, is affirmed. Voris Auten, A. L. J. (Seal). Same day an exception is noted and bill sealed for the Defendant. Voris Auten, A. L. J. (Seal). July 27, 1903, defendant appeals to the Superior Court of Pennsylvania, and makes affidavit that appeal is not for delay, &c., and files bond in the sum of $200, with Max L. Mitchel

as surety. July 28, 1903, Certiorari from the Superior Court of Pennsylvania, sitting at Philadelphia, received and filed. Aug. 4, 1903, Record certified. Nov. 3, 1904, Remittitur from the Superior Court, received and filed, in which it appears that "Judgment is affirmed." May 25, 1905, Certiorari from the Superior Court received and filed. Returnable forthwith.

92 STATE OF PENNSYLVANIA, *County of Northumberland, ss:*

I, James A. McCarthy, Clerk of the Court of Quarter Sessions of the Peace, in and for Northumberland County, do hereby certify that the foregoing is a full, true and correct copy of the case therein stated, viz. *In re* petition of N. L. Rearick to appeal from summary conviction, recorded to No. 173, May Sessions, 1902, so full and entire as the same remains of Record in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, this 26th day of May, A. D. 1905.

[SEAL.] JAMES A. McCARTHY, *Clerk.*

93 UNITED STATES OF AMERICA, *State of Pennsylvania, ss:*

I, Alex. K. McClure, Prothonotary of the Superior Court of Pennsylvania, do hereby certify that the foregoing record pages 1 to 92 inclusive, is a true and faithful copy of the record and proceedings of the Superior Court of the State of Pennsylvania, in a certain suit therein pending wherein N. L. Rearick was appellant and the Commonwealth of Pennsylvania was appellee.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Superior Court of the State of Pennsylvania, at Philadelphia, the 12th day of June, 1905, and in the one hundred and twenty-ninth year of the Independence of the United States.

[Seal of the Superior Court of Pennsylvania.]

ALEX. K. McCLURE,
Prothonotary of the Superior Court of Pennsylvania.

94 I, Charles E. Rice, President Judge of the Superior Court of Pennsylvania, do hereby certify, That Alex. K. McClure, was, at the time of signing the annexed attestation, and now is, Prothonotary of the said Superior Court of Pennsylvania, sitting at Philadelphia, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 12th day of June, one thousand nine hundred and five.

CHARLES E. RICE.

I, Alex. K. McClure, Prothonotary of the Superior Court of Pennsylvania, sitting at Philadelphia, do certify, That the Honorable Charles E. Rice, by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, President Judge of the Superior Court of Pennsylvania; to whose

acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Superior Court of Pennsylvania, sitting at Philapelphia, this 12th day of June, one thousand nine hundred and five.

[Seal of the Superior Court of Pennsylvania.]

ALEX. K. McCLURE.

95 In the Superior Court of Pennsylvania, Sitting at Philadelphia, October Term, 1903.

No. 171.

COMMONWEALTH OF PENNSYLVANIA, Appellee,
vs.
N. L. REARICK, Appellant.

In the Supreme Court of the United States.

Assignments of Error.

Now comes N. L. Rearick, and in connection with the petition for a Writ of Error filed herein, respectfully submits that in the record, proceedings, decision, and final judgment of the Superior Court of the State of Pennsylvania in the above entitled matter there is manifest error in this, to wit:

First. The Superior Court erred in affirming and in not reversing the Court of Quarter Sessions of Northumberland County for refusing the defendant's first point, which point and the answer thereto are as follows:

"All the acts of the defendant complained of as illegal in this case, and for which he was arrested under the provisions of the ordinance of the Borough of Sunbury, approved December 9th, 1899, which ordinance is recited in the statement of facts agreed upon, were done in carrying on Inter-state Commerce, and the arrest of the defendant is illegal and void because the ordinance above referred to, so far as it applies to the defendant, is in restraint of Inter-state Commerce and is therefore a violation of Clause 3, Section 8 of Article 1 of the Constitution of the United States, which provides that 'Congress shall have power * * * to regulate commerce with foreign nations and among the several states and the Indian tribes.'"

Answer: "Refused."

96 Second. The Superior Court erred in affirming and in not reversing the Court of Quarter Sessions of Northumberland County for refusing the defendant's second point, which point and the answer thereto are as follows:

"The arrest of the defendant is illegal and void because the ordinance of December 9, 1899, as far as the defendant is concerned, is

in restraint of trade. It abridges the right, freedom and liberty of contract and for that reason violates Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

Answer: "Refused."

Third. The Superior Court erred in affirming and in not reversing the court of Quarter Sessions of Northumberland County for refusing the defendant's third point, which point and the answer thereto are as follows:

"The arrest of the defendant is illegal and void because, so far as the defendant is concerned, the ordinance of December 9, 1899, is unconstitutional in that it discriminates between persons and denies the equal protection of the laws. It gives rights, privileges and immunities to some which it denies to others. It is in violation of the last clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that 'No state * * * shall deny to any person within its jurisdiction the equal protection of the laws.'"

Answer: "Refused."

Fourth. The Superior Court erred in affirming and in not reversing the court of Quarter Sessions of Northumberland County for holding that, "Before delivery, therefore, they" (referring to the brooms) "ceased to be subjects of Interstate Commerce and became
97 mingled with the Common mass of property of the State, and therefore subject to the laws and ordinances of the Commonwealth."

Fifth. The Superior Court erred in affirming and in not reversing the Court of Quarter Sessions of Northumberland County for holding, that, "while they" (the brooms) "had in a certain manner been designated at Columbus as property to be delivered to the persons whose names were on the respective tags, and were delivered to the railroad company as a common carrier, yet they remained in the custody and control of the company or their agent, the defendant. The title to the brooms did not pass to the person who had ordered them until delivered at his house, and they had been inspected and paid for. If the purchaser refused to accept and pay for his purchase the defendant's duty was to return the refused articles to his principal at Columbus. The place of sale therefore of these articles was the borough of Sunbury."

Sixth. The Superior Court erred in affirming and in not reversing the Court of Quarter Sessions of Northumberland County for affirming and refusing to reverse the judgment of the Justice of the Peace, imposing a fine of $25.00 and costs upon N. L. Rearick, the defendant and appellant, in this case, and committing said Rearick to the jail of Northumberland County, Pennsylvania, until said fine and costs were paid.

Seventh. The Superior Court erred in holding, that "the agreement as to the facts would not warrant a finding that the contract was that the goods should be shipped from Columbus by the Supply Company to the purchaser, and if such had been the contract it was not performed according to its terms. These were contracts made in Pennsylvania, to deliver goods at the residences of the purchasers in Pennsylvania. The contracts of sale were, judged by their provisions only, executory contracts relating to commerce within the state of Pennsylvania and were subject to the laws of this state * * * The performance of the contract was, therefore,
98 not necessarily concerned with Interstate Commerce."

Eighth. The Superior Court erred in holding, that, "We are of the opinion that the facts agreed upon as to the delivery of the brooms rendered the transaction subject to state regulation."

Ninth. The Superior Court erred in holding, that, "The ordinance in question violates no right of the appellant guaranteed by the Fourteenth Amendment of the Constitution of the United States."

Tenth. The Superior Court erred in holding, that the license ordinance of the borough of Sunbury approved December 9, 1899, did not deny the equal protection of the laws to the appellant, by excepting from the operation persons who solicit orders for, or deliver, articles of their own production or manufacture, and persons who sell otherwise than at retail.

Eleventh. The Superior Court erred in affirming the judgment of the Court of Quarter Sessions of Northumberland County.

Twelfth. The Superior Court erred in not reversing the judgment of the Court of Quarter Sessions of Northumberland County.

PHILEMON S. KARSHNER,
MAX L. MITCHELL,
Attorneys for N. L. Rearick, Appellant.

Endorsed on cover: File No. 19801. Pennsylvania Superior Court. Term No. 299. N. L. Rearick, Plaintiff in Error *vs.* The Commonwealth of Pennsylvania. Filed June 13th, 1905. File No. 19801.

SUPREME COURT OF THE UNITED STATES.

Supreme Court, U. S.
FILED
APR 14 1906
JAMES H. MCKENNEY,
Clerk.

No. 1, October Term, 1906.

S. A. REARICK,
Plaintiff in Error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Philemon S. Karshner and
Campbell M. Voorhees,
Attorneys for Plaintiff in Error.

E. B. TootHaker, Law Printer, 340 N. Third St., Camden, N. J.

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II. The ordinance in question is unconstitutional and void for the reason that it discriminates between persons and denies the equal protection of the laws. It gives rights, privileges and immunities to some which it denies to others. It is in violation of the last clause of Section 1, Fourteenth Amendment to the Constitution of the United States, which provides, that, "No state * * * shall deny to any person within its jurisdiction the equal protection of the laws 42-60

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(19,801)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 299.

N. L. REARICK,

PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In the months of March and April, 1902, J. S. Kunkle, an agent in the employ of The Citizens' Wholesale Supply Company, an Ohio corporation, located in Columbus, Ohio, and there doing business as grocers, went from house to house in the borough of Sunbury, Pennsylvania, and took orders for such goods as are generally sold by grocers, to be filled by his

employer, said Company. These orders Kunkle forwarded to the Company at Columbus. The Company filled the orders by placing all the articles, except brooms, ordered by one individual, in a box or boxes in which no other goods were placed. The boxes were then closed and addressed to N. L. Rearick, at Sunbury, Pennsylvania. Rearick was the agent of the Company at that place whose duty it was to deliver the goods to the purchasers. On each box was also marked the name of the person who had purchased its contents and to whom it was to be delivered by Rearick.

The Company in filling the orders for brooms, bound together all those ordered by one person and tied thereto a tag, addressed to Rearick and marked with the name of the purchaser, preceded by the word "For." The brooms to fill several separate orders were then aggregated together and tied into bundles for convenience in shipment. (Record, p. 29.) The Company then shipped from Columbus, Ohio, the said boxes of goods and bundles of brooms by the Pennsylvania Railroad to N. L. Rearick, its said agent at Sunbury, Pennsylvania, to be by him delivered to the respective purchasers. Rearick received these goods at Sunbury, and, after cutting apart the several separate orders of brooms, delivered them with the boxes from the Pennsylvania R. R. freight station to the several purchasers, each person receiving the boxes and brooms that were marked with his name and designed to fill his order.

While engaged in delivereing these goods to the several purchasers in the borough of Sunbury, Pennsylvania, on April 14, 1902, Rearick was arrested, charged with violating an ordinance of said borough, making it unlawful to deliver goods by retail, without first having obtained a license so to do. He

was carried before J. P. Carpenter, a justice of the peace, in and for said borough, by whom he was convicted and fined $25.00 and costs for a violation of said ordinance and committed to the jail of Northumberland County until said fine and costs were paid. (Record, p. 26.) (For copy of ordinance, see Record, p. 43.) Rearick then appealed to the Court of Quarter Sessions of Northumberland County, where an "Agreed Statement of Facts" (Record, p. 28, 29, 30, 31 and 32), was submitted to the court for its opinion.

Appeals of his sort are tried *de novo* in the Quarter Sessions Courts of Pennsylvania.

In the Court of Quarter Sessions Rearick filed a written request asking the court to find the following conclusions of law as those governing the questions in controversy in the case (Record, p. 33):

1. All of the acts of the defendant complained of as illegal in this case, and for which he was arrested under the provisions of the ordinance of the borough of Sunbury, approved December 9, 1899, which ordinance is recited in the statement of facts agreed upon, were done in carrying on interstate commerce, and the arrest of the defendant is illegal and void because the ordinance above referred to, so far as it applies to the defendant, is in restraint of interstate commerce and is therefore a violation of Clause 3, Section 8 of Article 1 of the Constitution of the United States, which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes."

2. The arrest of the defendant is illegal and void because the ordinance of December 9, 1899, so far as the defendant is concerned, is in restraint of trade. It abridges the right, free-

dom and liberty of contract and for that reason violates Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3. The arrest of the defendant is illegal and void because, so far as the defendant is concerned, the ordinance of December 9, 1899, is unconstitutional in that it discriminates between persons and denies the equal protection of the laws. It gives rights, privileges and immunities to some which it denies to others. It is in violation of the last clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides, that, "No state * * * shall deny to any person within its jurisdiction the equal protection of the laws."

Substantially the same claims were made by Rearick orally before the justice of the peace.

The Quarter Sessions Court overruled the request for findings of law (Record, p. 33) and in an opinion (Record, p. 34, 35, 36, 37, 38 and 39) affirmed the judgment of the justice of the peace. Rearick then appealed to the Superior Court of Pennsylvania, sitting at Philadelphia, which court in an opinion (Record, p. 12) affirmed the judgment of the Court of Quarter Sessions, Henderson, J., dissenting. Rearick then filed his petition in the Supreme Court of Pennsylvania (Record, p. 9) praying for leave to appeal to that court, but said court refused to allow an appeal. (Record, p. 10.)

Under the provisions of Sections 709 and 710 of the Revised Statutes of the United States as amended in 1875 (18 Statutes at Large, p. —), the case is brought to this court on writ of error to the Superior Court of Pennsylvania. The said Superior Court being the highest court of law or equity in the State of Pennsylvania in which a judgment in this case can or could be had because of the action of the Supreme Court of that state in refusing to allow an appeal.

The learned Superior and Quarter Sessions Courts (Henderson, J., of the Superior Court dissenting), and the justice of the peace, held, that when Rearick broke the bundles of brooms and delivered therefrom the brooms designed to fill the orders of the persons with whose names they were marked, he was not engaged in inter-state commerce and was therefore amenable to the Sunbury ordinance in question. (Record, p. 19, 38 and 39.) Those courts further held that the ordinance did not violate any right of the plaintiff in error that is guaranteed by the Fourteenth Amendment to the Federal Constitution. To all of which judgments, findings and holdings Rearick duly excepted.

SPECIFICATION OF ERRORS.

The errors into which we conceive the learned Superior Court to have fallen in reaching the conclusions of which we complain consist:

First, in affirming and in not reversing the Court of Quarter Sessions of Northumberland County for refusing Rearick's first point, which point and the answer thereto are as follows:

"All the acts of the defendant complained of as illegal in this case, and for which he was arrested under the provisions

of the ordinance of the borough of Sunbury, approved December 9, 1899, which ordinance is recited in the statement of facts agreed upon, were done in carrying on inter-state commerce, and the arrest of the defendant is illegal and void because the ordinance above referred to, so far as it applies to the defendant, is in restraint of inter-state commerce and is therefore a violation of Clause 3, Section 8 of Article 1, of the Constitution of the United States, which provides that 'Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes.' "

Answer: "Refused."

Second. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for refusing Rearick's second point, which point and the answer thereto are as follows:

"The arrest of the defendant is illegal and void because the ordinance of December 9, 1899, so far as the defendant is concerned, is in restraint of trade. It abridges the right, freedom and liberty of contract and for that reason violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' "

Answer. "Refused."

Third. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for refusing Rearick's third point, which point and the answer thereto are as follows:

"The arrest of the defendant is illegal and void because, so far as the defendant is concerned, the ordinance of December 9, 1899, is unconstitutional in that it discriminates between persons and denies the equal protection of the laws. It gives rights, privileges and immunities to some which it denies

to others. It is in violation of the last clause of Section 1 of the Constitution of the United States, which provides that 'no state * * * shall deny to any person within its jurisdiction the equal protection of the laws.' "

Answer. "Refused."

Fourth. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for holding that, "Before delivery, therefore, they (referring to the brooms) ceased to be subjects of interstate commerce and became mingled with the common mass of property of the state, and therefore subject to the laws and ordinances of the commonwealth."

Fifth. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for holding, that, while they (the brooms) had in a certain manner been designated at Columbus as property to be delivered to the persons whose names were on the respective tags, and were delivered to the railroad company as a common carrier, yet they remained in the custody and control of the company or their agent, the defendant. The title to the brooms did not pass to the persons who had ordered them until delivered at his house, and they had been inspected and paid for. If the purchasers refused to accept and pay for his purchase the defendant's duty was to return the refused articles to his principal at Columbus. The place of sale therefore of these articles was the borough of Sunbury."

Sixth. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for affirming and refusing to reverse the judgment of the justice of peace, imposing a fine of $25.00 and costs upon N. L. Rearick, defendant below and plaintiff in error, in this case, and committing said Rearick to the jail of Northumberland County, Pennsylvania, until said fine and costs were paid.

Seventh. In holding that, "the agreement as to the facts would not warrant a finding that the contract was that the goods should be shipped from Columbus by the Supply Company to the purchaser, and if such had been the contract it was not performed according to its terms. These were contracts made in Pennsylvania, to deliver goods at the residences of the purchasers in Pennsylvania. The contracts of sale were, judged by their provisions only, executory contracts relating to commerce within the State of Pennsylvania and were subject to the laws of this state. The performance of the contracts was, therefore, not necessarily concerned with interstate commerce."

Eighth. In holding that, "we are of the opinion that the facts agreed upon as to the delivery of the brooms rendered the transaction subject to state regulation."

Ninth. In holding that "the ordinance in question violates no right of the appellant (Rearick) guaranteed by the Fourteenth Amendment of the Constitution of the United States."

Tenth. In holding that the license ordinance of the borough of Sunbury approved December 9, 1899, did not deny the equal protection of the laws to the appellant (Rearick), by excepting from its operation persons who solicit orders for, or deliver, articles of their own production or manufacture, and persons who sell otherwise than at retail.

Eleventh. In affirming the judgment of the Court of Quarter Sessions of Northumberland County.

Twelfth. In not reversing the judgment of the Court of Quarter Sessions of Northumberland County.

ARGUMENT.

Introductory.

The questions raised on the facts in this case by the plaintiff in error, require the application of certain provisions of the Constitution of the United States for their determination. These provisions are, as pointed out in the specification of errors, the Commerce Clause and Section 1 of the Fourteenth Amendment. The questions presented here are:

1. Under the facts agreed upon was Rearick, the plaintiff in error, engaged in commerce among the states, and, if so engaged, was he amenable to the Sunbury ordinance?

2. Does the ordinance of the borough of Sunbury, Pennsylvania, of December 9, 1899, entitled "an ordinance to provide for the licensing of canvassers," etc., violate the provisions of Section 1 of the Fourteenth Amendment to the Federal Constitution?

We shall consider these questions in their order.

I.

INTER-STATE COMMERCE.

A.

As to the Soliciting of Orders.

IT IS A PRINCIPLE ESTABLISHED BEYOND CONTROVERSY THAT "THE NEGOTIATION OF SALES OF GOODS THAT ARE IN ANOTHER STATE FOR THE PURPOSE OF INTRODUCING THEM INTO THE STATE IN WHICH THE NEGOTIATION IS MADE IS INTER-STATE COMMERCE" AND IS PROTECTED FROM LOCAL INTERFERENCE, BURDENS, OR TAX, BY CLAUSE 3, SECTION 8 OF ARTICLE 1, CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES, THAT, "CONGRESS SHALL HAVE POWER * * * TO REGULATE COMMERCE WITH FOREIGN NATIONS AND AMONG THE SEVERAL STATES AND WITH THE INDIAN TRIBES."

It seems unnecessary to go into an extended discussion of this subject—a subject with which this court is very familiar. We shall, therefore, content ourselves with a brief review of the cases bearing thereon and their application to the matters here in controversy.

The leading case that established this doctrine was that of *Robbins* v. *Taxing District of Shelby County*, 120 U. S., 489. That case came to this court on a writ of error to the Supreme Court of Tennessee, which had held valid a statute of that state, by which it was enacted that,

> "All drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling, goods, wares, or merchandise therein

by sample, shall be required to pay to the county trustee the sum of $10.00 per week or $25.00 per month for such privilege."

Robbins, the plaintiff in error, was convicted of having offered for sale by sample, articles of merchandise (stationery) belonging to a firm in Cincinnati without having procured a license. Mr. Justice Bradley, who delivered the opinion of the court, after discussing the fundamental principles that govern inter-state commerce, says:

"In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a *state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein.* Do not such restrictions affect the very foundation of inter-state trade? How is a *manufacturer* or a *merchant* of one state to sell his goods in another state without in some way obtaining orders therefor? In these cases, then, what shall the *merchant* or *manufacturer* do who wishes to sell his goods in another state? Must he sit still in his warehouse and wait for the people of those states to come to him? This would be a silly and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons *residing* or *doing* business in those other states. But how is the *merchant* or *manufacturer* to secure such orders? If he may be taxed by such state for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon inter-state commerce is to speak at least unadvisedly, and without due attention to the truth of things. It may be suggested that the *merchant* or *manufacturer* has the postoffice at his command and may soloicit orders through the mails. *We do not suppose, however, that anyone would seriously contend that this is the only way in which his business can be transacted without being amenable to exaction on the part of the state.* Besides, why could not the state to which his let-

ter might be sent tax him for soliciting orders in this way as well as in any other way? *The truth is that in numberless instances the most feasible, if not the only practicable way, for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase.* But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on inter-state commerce? It seems to be forgotten in argument that the people in this country are citizens of the United States, as well as of the individual states, and that they have some rights under the constitution and laws of the former independent of the latter, and free from any interference or restraint from them.* * * It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. *Inter-state commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the states.* This was decided in the *State Freight Tax Case,* 15 Wall., 232. *The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is inter-state commerce."*

At page 499 of the same report Justice Bradley says:

*"This kind of taxation is usually imposed at the instance and solicitation of domestic dealers as a means of protecting them from foreign competition. * * * But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon*

inter-state commerce, but that it is intended to have that effect is one of its principle objects. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation." (The italics are counsels.)

To the same effect are the cases of *Corson* v. *Maryland*, 120 U. S., 502; *Leloup* v. *Mobile*, 127 U. S., 640; *Asher* v. *Texas*, 128 U. S., 129; *Stoutenburg* v. *Hennick*, 129 U. S., 140; *McCall* v. *California*, 136 U. S., 104, and *Crutcher* v. *Kentucky*, 141 U. S., 47. The question was again before this court in the case of *Brennan* v. *Titusville*, 153 U. S., 289. Mr. Justice Brewer who delivered the opinion of the court in that case, said at page 299:

"The question in this case is whether a manufacturer of goods which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state can send an agent to another state to solicit orders for the products of his manufactory, without paying to the latter a state tax for the privilege of thus trying to sell his goods.

"It is true, in the present case the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the state can tax for the privilege of selling to one class it can for selling to another or to all. *In either case it is a restriction on the right to sell and a burden on lawful commerce between the citizens of the two states.*

"*It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce.*" (The italics are counsels.)

This question was again before this court in the recent case of *Stockard* v. *Morgan*, 185 U. S., 27. In that case it was held that a tax could not be levied on merchandise brokers whose sole business consisted in soliciting orders from jobbers and wholesale dealers within the State of Tennessee as agents for non-resident parties, firms or corporations. Mr. Justice Peckham delivering the opinion of the court, says, at pages 35 and 37:

> "Although the state has general power to tax individuals and property within its jurisdiction, yet it has no power to tax inter-state commerce, even in the person of a resident of the state. We regard this case as within the Robbins and other similar cases above referred to."

In our case Rearick, the plaintiff in error, was delivering goods to purchasers in the borough of Sunbury, Pennsylvania, that had been shipped to him by his principal, The Citizens' Wholesale Supply Company from the State of Ohio, for that purpose. Orders for the goods had previously been solicited and taken by another agent in the employ of the same company. (Record, p. 28.) These orders were solicited and taken in almost identically the same manner as they were taken in the cases decided by this court and referred to above. The facts in this case, therefore, respecting the soliciting of orders bring it within the rule laid down in those cases.

Porter, J., in delivering the opinion of the court below, said (Record, p. 15):

> "These were contracts, made in Pennsylvania to deliver goods at the residences of the purchasers in Pennsylvania. The contracts of sale were, judged by their provisions only, executory contracts relating to commerce within the State of Pennsylvania, and were subject to the laws of this state. The appellant's principal could have filled these contracts by tendering the delivery of

any goods of the kind and quality of the samples shown, obtained from sources within the State of Pennsylvania; whether the contemplated traffic should go outside the state or not was left to chance or extrinsic business considerations. The performance of the contract was, therefore, not necessarily concerned with inter-state commerce. *Diamond Glue Company* v. *United States Glue Company*, 187 U. S., 611. If the transaction ever came within the protection of the inter-state commerce clause of the federal constitution, it was not because of the inherent covenants of the contract, but from the manner in which those covenants were executed."

It is difficult to understand how the Superior Court could have reached the above conclusion from the facts in the case. The facts show that the orders for the goods delivered by Rearick were solicited and taken in Sunbury by J. S. Kunkle, an agent in the employ of The Citizens' Wholesale Supply Company; that The Citizens' Wholesale Supply Company is a corporation located and doing business in the City of Columbus, Ohio; and that the orders for the goods after being taken were sent by Kunkle to his principal at Columbus, Ohio, (Record, p. 28), at which point the goods were packed to fill the orders and from there shipped to Sunbury, Pennsylvania, to be delivered by its agent, Rearick, to the purchasers in pursuance of the contracts. Each order was directed to The Citizens' Wholesale Supply Company at Columbus, Ohio, (Record, p. 40). Is not such an order an inter-state commerce contract? Was it necessary to have a special provision in the contract to the effect that the goods should be sent from the State of Ohio? This would be absurd. It is safe to say that of all the inter-state commerce that is done in the country, there is scarcely a single provision of the kind to be found in any contract concerning that commerce. Can any-

one point to a single order form of any of the great commercial or publishing houses that contains such a provision?

In this case The Citizens' Wholesale Supply Company had no place of business whatever other than that located in Columbus, Ohio. These orders were taken in Sunbury for goods which were then in the warehouse of The Citizens' Wholesale Supply Company in Columbus, Ohio. This is conclusively proven by the fact that the company upon the receipt of the orders, filled them with goods which were then at its warehouse. For a contract of sale to be a contract involving interstate commerce, it is only necessary that the goods which are sold, are, at the time of sale, in another state, and that they are, by the terms of the contract, to be introduced into the State where the sale is made. This is the rule laid down in the Robbins and other cases *and the facts of this case meet every requirement of this rule.* These contracts of sale were made in Pennsylvania of goods that were then in Ohio and for the purpose of introducing them into the former state from the latter state. In not a single case, similar to this one, that has been before this court or before the Federal Courts or the State Supreme Courts, of which we have any knowledge are the facts different from those in this case on the point discussed. That portion of the Agreed Statement of Facts in this case that relates to the soliciting of orders is almost exactly like the facts in *Brennan* v. *Titusville,* 153 U. S., 289. A comparison of the facts in the two cases will reveal the truth of this statement. How is it possible, then, to have two different rules for facts that are exactly similar? It is evident that the court below overlooked this similarity and thus fell into error.

B.

As to the Delivery—The Transportation.

THE DELIVERY OF GOODS TO A BUYER AT HIS RESIDENCE IN ONE STATE, THAT HAVE BEEN SENT IN PURSUANCE OF CONTRACT BY A SELLER IN ANOTHER STATE, IS INTERSTATE COMMERCE AND SUBJECT TO NO STATE NOR LOCAL BURDENS. THE RIGHT TO SOLICIT ORDERS IMPLIES THE OBLIGATION AND THE RIGHT TO DELIVER THE GOODS IN THE MANNER CALLED FOR BY THE CONTRACTS; AND THE MEANS BY WHICH THE DELIVERY IS MADE CANNOT BE CONTROLLED BY THE STATES.

For making the delivery of these goods to the purchasers, Rearick was arrested for violating an ordinance (Record, p. 24) of Sunbury which made it unlawful for any person or persons to

> "*solicit orders for, sell or deliver at retail,* either on the streets or by traveling from house to house within the limits of the borough of Sunbury, any books, paintings, foreign or domestic goods, wares, mercandise, or fruits, not of their own manufacture or production, without first obtaining from the Chief Burgess of the borough of Sunbury a license for such purpose."

Rearick was convicted and fined $25 and costs and committed to the jail of Northumberland county for the period of thirty days and until said fine and costs were paid.

It will be seen that this ordinance, as it was applied to this case, was an attempt on the part of the borough of Sunbury, to regulate commerce moving from the seller in the State of Ohio to the purchasers in Pennsylvania. It was an attempt to interpose between the contract of sale and the

delivery of the goods, and to exact a tribute from the seller for the privilege of fulfilling his contract by making delivery of the articles sold. Can this be successfully done when the goods are in course of transportation from one state to their destination in another? To exact a tribute in such case for the privilege of delivering the goods, is equivalent to exacting a tribute for soliciting the orders. It is idle to say that a person may solicit orders free from the dictation of the state, but that the state or its political subdivisions may tax the delivery or prescribe the manner in which it shall be made.

It was said by Mr. Justice Mathews in the case of *Bowman v. R. R. Company*, 125 U. S., 465, 479:

> "It cannot be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the states."

And quoting with approval the language of Mr. Justice Strong, who delivered the opinion of the court in the case of the *State Freight Tax*, 15 Wall, 232, 275, Mr. Justice Mathews continues:

> "'Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. * * * *It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the states* * * * *nor does it make any difference whether this interchange of commoditiies* is by land or by water. *In either case the bringing of the goods from the seller to the buyer is commerce.*'"

The whole question in this case is decided by the words: "*In either case the bringing of the goods from the seller to*

the buyer is commerce." Rearick was bringing goods from the seller in Ohio to the buyers in Pennsylvania.

In the late case of *Rhodes* v. *Iowa,* 170 U. S., 412, Mr. Justice White, delivering the opinion of the court says, at page 419:

> "The fundamental right which the decision in the Bowman case held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one state into another, from the point of transmission to the point of consignment: *and the accomplishment there of the delivery covered by the contract."* (The italics are counsel's.)

In the *State Freight Tax Case,* 15 Wall, Mr. Justice Strong delivering the opinion of the court, says, at page 276:

> "The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines."

The payment of the license fee required by the Sunbury ordinance was a condition upon which was made to depend the right of the plaintiff in error to deliver these goods. The fee required to be paid was so high that, if the ordinance were enforceable, it would prohibit commerce of this character.

Is it possible that the borough of Sunbury can regulate interstate commerce in such manner? The answer to this ques-

tion is contained in the opinion in the case of *Rhodes* v. *Iowa*, supra, to which we shall again refer briefly. In that case it was expressly held that merchandise is protected while in the course of transportation from the point of transmission in one state to the point of consignment in another, "*and the accomplishment there of the delivery covered by the contract.*" In this case the contracts called for the delivery of the goods at the residence of the purchasers. (Record, p. 30.) Was not the plaintiff in error engaged in accomplishing the transportation of this merchandise as called for by the contracts and was he not protected while so doing?

The Manner in Which Interstate Commerce is Transported Cannot be Controlled by the States.

In this case a number of brooms to fill orders were tied in bundles "solely for convenience in shipment" (Record, p. 29) and when they arrived in Sunbury from Columbus, Ohio, they were received by the agent of the vender, the plaintiff in error, who cut them apart and delivered them to the purchasers as per tag on the handle or handles; each purchaser receiving the broom or brooms that had been selected by the vender in Columbus to fill his order. (Record, p. 31.)

The court below held, in substance, respecting the foregoing facts, that the delivery of the brooms by Rearick, after they had been cut apart, was subject to regulation by the laws of Pennsylvania and by this ordinance of Sunbury; that when the twine that bound the brooms together in bundles was cut, the brooms became mixed with the general mass of property in Pennsylvania, and, were, therefore, subject to the laws of that state and to the Sunbury ordinance. Did the cutting of the brooms apart render the subsequent transaction

of delivering them to the purchasers subject to the provisions of the ordinance? This is one of the chief questions in controversy in this case.

These brooms, with other goods, came into Pennsylvania from Ohio, in pursuance of contracts of sale with various individuals in Sunbury. They never became a stock in trade nor the part of a stock in trade in Pennsylvania. They were shipped into that state *from Ohio, solely for the purpose of being delivered to the persons who had previously ordered them.* (Record, p. 31.) *Each was marked with the name of its purchaser.* The breaking of the bundles and the subsequent delivery of the brooms did not work a violation of the ordinance. They had not yet reached the destination called for by the contracts, viz, the residences of the purchasers. The plaintiff in error was engaged in carrying them to their destination when arrested, *charged with the very act of moving the goods to their ultimate places of rest in Pennsylvania.* This is not a case that has anything to do with original packages. These goods did not come into Pennsylvania to be sold or offered for sale; they had already been sold while they were in the State of Ohio, and were on their way from the latter state to complete those sales. The *purchasers were the importers.* The "brooms were in Sunbury for no other purpose than to fill their orders." Record, pp. 31 and 32.)

The delivery was a portion of the transportation, and beyond the power of the borough to control. The court below held, respecting separate boxes of goods, that they were free from regulation.

The boxes and brooms were in Sunbury for the same purpose. To say that no license is required if goods are delivered in a certain manner, but if delivered otherwise a license must first be procured, is surely a regulation of commerce.

Let us see where the doctrine of the court below respecting this point would lead. Were it sustained, the states could regulate the manner of packing, marking and transporting all goods that enter its borders from other states. They could prescribe such onerous regulations with respect thereto that there could no longer be an interchange of commodities among the states. But they cannot regulate these matters. For them to do so would be to regulate the transportation of interstate commerce which is within the exclusive control of Congress.

Mr. Justice Field, delivering the opinion of this court in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, said at page 203:

> *"The means of transportation of persons and freight between the states does not change the character of the business as one of commerce, nor the time within which the distance between the states may be traversed."*
>
> *"The power of Congress to regulate commerce, also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."*

This is an exclusive power in Congress. If, then, the borough cannot regulate the manner in which merchandise involved in interstate commerce shall be shipped, how is it possible for it to require that a seller in another state shall transmit goods to buyers in the borough by common carrier? Is it not manifest that such a requirement would be a regulation of commerce?

If a seller desires to ship from one state to another state, several packages of goods in the same box to fill the orders of different persons, he may do so, and, upon the arrival of the box at its destination, he or his agent may assort the pack-

ages and deliver the same to the respective purchasers. Such a method of shipment and delivery, when the goods pass from one state to another, "*is a means of transportation over which the states have no control.*"

A case precisely in point with this one was that of Caldwell v. North Carolina, 187 U. S., 622. That case clearly and unequivocally establishes the principles above referred to and supplies the rule by which the case at bar must be decided. The case of *Caldwell* v. *North Carolina* reached this court on a writ of error to the Supreme Court of North Carolina, which court had held valid an ordinance of the city of Greensboro by which it was enacted, that

> "every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year."

The ordinance made it an offense to engage in said business without first procuring a license.

The facts in that case were as follows:

> "The defendant, Caldwell, being employed by the Chicago Portrait Company of Chicago, Illinois, went to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employes of the Chicago Portrait Company, who had preceded the defendant in Greensboro. The defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to his rooms in the Woods House, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames, and from this point de-

livered the pictures, one at a time, to the purchasers in the city of Greensboro. The defendant had paid the city no license tax and had been engaged in this work two days when arrested."

In delivering the opinion of this court Mr. Justice Shiras said, at page 630:

"The State Supreme Court endeavored to distinguish the present case from that of Brennan v. Titusville in the following observations:

" 'The defendant insists that Brennan v. Titusville is directly in point—is in every essential fact, this case—and should control the opinion of the court on appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case the goods were shipped directly to the purchaser. In this case the goods were shipped by the Chicago Portrait Company to itself in the city of Greensboro; and when they reached Greensboro the defendant, as the agent of the Chicago company, received them from the railroad at its depot, carried them to its room in Greensboro, opened the boxes in which they were shipped, took out the pictures and frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of Brennan v. Titusville, and we should so hold as it was held there that it was an interference with Interstate Commerce, and that the defendant was not guilty. But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract. If they had been completed in Chicago and under contract shipped to the purchasers, the title would have passed to the consignee upon delivery to the railroad in Chicago, the railroad being deemed to be the agent of the consignee and Brennan v. Titusville would have applied, as the tax would then have been upon the commerce. But instead of completing the pictures in Chicago and

shipping them to the parties who had contracted for them, they were shipped to themselves, the Chicago Portrait Company, in Greensboro. This being so, no title ever passed from the Chicago Portrait Company until the pictures were put in their frames and delivered by the defendant. These pictures belonged to the Chicago company when they were shipped from Chicago, and belonged to it when they got to Greensboro, and the question is, could the Chicago company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax for which its own citizens would be ilable? It seems to us that it could not.' "

Mr. Justice Shiras, after quoting the foregoing from the opinion of the Supreme Court of North Carolina, said:

"We are not persuaded by this reasoning. It seems to proceed from two propositions: first, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro. But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vender out of the state or the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the puchasers, whether in the same or separate packages, such a transaction would beyond question be interstate commerce beyond the reach of the taxing power of the state. It is too plain for argument that the supposed incomplete condition of articles of commerce if shipped directly to the purchaser cannot subject them to the license tax. But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and placing the pictures in their proper places (the language of the verdict)

meant that each picture was placed in the frame designed for it.

"*Nor does the fact that the articles were not shipped separately, and directly to each individual purchaser, but were sent to an agent of the vender at Greensboro, who delivered them to the purchaser, deprive the transaction of its character as interstate commerce. It was only that the vender used two instead of one agency in the delivery. It would be evident that, if the vender had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vender himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent, who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate.*" (The italics are counsels.)

"Transactions between manufacturing companies in one state, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser are free from state taxation, but if sent to an agent to deliver are taxable, through a license upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the constitution."

It will be seen from the foregoing opinion that this court has held that it is not necessary to ship "articles separately and directly to each individual purchaser," but that they may be shipped in bulk to an agent of the vender, and he may deliver them without being amenable to the state; and that such a means of shipment and delivery "does not deprive the transaction of its character as interstate commerce."

The Sunbury ordinance here in question requires a license for the *delivery* of the goods just as the Greensboro ordi-

nance required a license for the delivery of the pictures and frames. There is no difference between the ordinances in the two cases, except that the Sunbury ordinance requires a much more unreasonable sum to be paid for a license, and makes arbitrary and unjust discriminations, while the Greensboro ordinance makes no discriminations whatever. In the Caldwell case the articles were shipped from the vender at Chicago to itself at Greensboro, N. C., and were delivered by its agent. In this case the articles were shipped from the vender at Columbus to its agent at Sunbury, and he delivered them. The agent in the Caldwell case broke the packages, put the pictures and frames properly together, and delivered them. Here the plaintiff in error broke the bundles and delivered the brooms, with the other goods to the purchasers.

It will be seen that the Caldwell case is perfectly in point with this one and the rule there laid down is the rule for this case. In view of this and other decisions of this court, it seems idle to argue this question further, but we wish to call the court's attention to a few cases prior to the decision in Caldwell case, and which are in point with the case at bar.

Judge Bond of the United States Circuit Court for the Eastern District of North Carolina, in the habeas corpus case of in re Spain, 47 Fed. Rep., 208, held where the venders at Charleston, West Va., shipped goods in bulk to their agents at Raleigh, North Carolina, for delivery to fill orders previously taken, and the agents upon the arrival of the goods, broke the bulk and delivered the goods to the purchasers, that there was no difference between such a case and the case of Robbins v. Taxing District, supra. He further held, that:

> *"We are of the opinion that under the decision of the Supreme Court this property did not become taxable in North Carolina until it reached the purchaser. It is idle*

to say that as the Supreme Court does in the case quoted, that a non-resident may send drummers or persons to solicit sales in a sister state, but that the state may tax him for making delivery of the goods sold. If these goods which petitioner sold in North Carolina had been placed in charge of an express company, packed in boxes, with directions to open the boxes at point of consignment and to deliver to the parties whose names were on a descriptive book the several articles set down thereon to them as purchasers, would the express company have been a peddler? The right to sell implies the obligation and right to deliver. It is as much interstate commerce to do the one as the other."

The same question came before Judge Reed of the United States Circuit Court for the Western District of Pennsylvania in the habeas corpus cases of *in re Nichols*, 48 Fed. Rep., 164, and *in re Tyerman*, 48 Fed. Rep., 187. In the former case, Nichols solicited orders for books in Titusville, Pa., for P. F. Collier & Co. of New York. In the latter case, Tyerman delivered the books to fill the orders previously taken by Nichols, and collected the price therefor. Both were discharged by Judge Reed, who quoted from the opinion of Judge Bond in the Spain case, supra, with approval, and added in the Tyerman case:

> "There is no difference in principle between the two cases, this petitioner being engaged in completing sales made by Mr. Nichols, and therefore engaged in interstate commerce."

In the case of *Huntington* v. *Mahan*, 142 Ind., 695, a case precisely similar to the Tyerman case, supra, the Supreme Court of Indiana held that the city of Huntington could not levy a license tax on any agent delivering books that had been sent from New York to fill orders previously taken. The Supreme Court of Louisiana in the case of *Tax Collector*

v. *Pettigrew*, 44 La., 356, came to the same conclusion in a clock case. The court in deciding the case, said:

> "The clocks were shipped (from New York) to convenient points for delivery to the purchasers by the defendant's agents. After the orders were obtained the clocks were in fact shipped directly to the purchasers. *The fact that their agent received and delivered them cannot so locate them in the state as to make them a part of the general mass of the property subject to taxation. They became so when delivered to the purchasers.*"

In the case of *State* v. *Willingham*, 62 Pac. Rep., 797, a Wyoming case, the Supreme Court of that state reached the same conclusion in a case where an agent of the Chicago Portrait Company was delivering pictures and frames. The court held, that,

> "The delivery of the articles to the persons ordering them did not constitute a sale by the agent making the delivery, but * * * was only one of the steps taken by the Chicago Company in the performance of its contract. They were still the subjects of interstate commerce, and the arrest of the agent was not authorized by law."

Since the decision in the Caldwell case, supra, the Supreme Court of Georgia in the case of *Stone* v. *State*, 117 Ga., 291, held to the same effect, as did also the Supreme Court of Nebraska in the case of *Menke* v. *State*, 97 Northwestern Rep., 1020. Those two cases are almost precisely similar to the case at bar, the defendants having been arrested for delivering goods without license. In both of those cases it was held that the defendants were not required to take out license for the reason that they were engaged in interstate commerce.

The decision in the case of *Caldwell* v. *North Carolina* was affirmed by this court in the late cases of the *N. & W. R. R. Co.* v. *Sims*, 191 U. S., 441; and the *American Express Co.*

v. *Iowa*, 196 U. S., 133. It was held in those cases, that the "C. O. D." business, as usually carried on through the agency of common carriers like railroad and express companies, was interstate commerce.

The business done by The Citizens' Wholesale Supply Company through the plaintiff in error in this case, was a "C. O. D." business, the vender employing a private agent, Rearick, in the delivery instead of a common, public agent like an express company. This is not an unusual method of transporting and delivering articles of commerce. Fruit trees are almost universally sold by agents who solicit orders for them by going from house to house or place to place. When the nurseryman receives the orders he selects the trees to fill each order, binds them together and tags them with the name of the purchaser. He then aggregates together the several bundles of trees, packs them in a large box or boxes and ships them to his agent for delivery to the purchasers. The agent receives the box, opens it and delivers to each purchaser the trees marked with his name and collects the contract price therefor. Books are sold and delivered in the same manner. Magazines and newspapers are likewise tied in bundles and transported and delivered to subscribers. Sometimes this is done through the agency of the postoffice. Sometimes a private agent is employed to make the distribution. It is also a custom of commerce for the vender to pack several packages of goods for different purchasers in one or more boxes and consign them to one of the purchasers or to a transfer company for distribution. The consignee upon the receipt of the boxes, breaks the bulk and delivers the several packages to the respective purchasers.

When commerce of this character passes from one state for delivery in another state, would the manner of delivery deprive the transaction of the protection of the commerce clause of the Constitution? The rule in such case that governs the delivery of "*pictures and frames*" is the rule that governs the delivery of fruit trees, books, magazines, newspapers, other merchandise and *brooms*

For this court to hold with the court below that the manner employed in the delivery of the brooms was not interstate commerce, would be to seriously cripple the business of The Citizen's Wholesale Supply Company with its customers in other states than Ohio. It would likewise have the same effect on the business of the great publishing houses, the nurserymen and the many other persons, firms and corporations that do business in precisely the same manner.

It is well known that these license taxes are for the very purpose of creating a monopoly in local dealers by hampering or destroying outside competition. A holding by this court that business like that done by the plaintiff in error is not interstate commerce would be to open the door for state interference with it. The local tradesmen would immediately instigate such interference and the result would be that a large portion of commerce would be completely destroyed. The people would thus be placed at the mercy of the dealers. Such a holding would further result in the adoption of a policy of protection and retaliation by the states that would bring about again the condition that existed under the articles of confederation. Instead of the union and good feeling that now exists among the states we would have dissension and discord which it was the great purpose of the Constitution to avoid.

But this court has fortunately held, whenever the question has been raised, that Congress has exclusive control over the transportation, purchase, sale and exchange of commodities in interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat., 1; *State Freight Tax Case*, 15 Wall, 232, 279; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S., 196, 203; *Robbins* v. *Shelby County Taxing District*, 120 U. S., 489; *Bowman* v. *R. R. Co.*, 125 U. S., 465.

The truth of the foregoing proposition is shown in the Caldwell case, supra, and the late "C. O. D." cases. In the "C. O. D." cases (American Express Co. v. Iowa and Adams Express Co. v. Iowa), 196 U. S., 133, this court, by Mr. Justice White, said:

> "When it is considered that the necessary results of the ruling below was to hold that wherever merchandise shipped from one state to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the constitution to promote. If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the state where made, to the laws of another state; and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions

> essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

The foregoing quotation from the opinion of Mr. Justice White embodies a rule of law that covers completely all the interstate commerce questions involved in this case and is decisive of those questions.

The learned court below held that the facts of this case did not bring it within the rule laid down in *Caldwell* v. *North Carolina,* supra, for the following reasons which we quote from the opinion of that court. (Record, p. 17.)

> "The contract in that case (the Caldwell case) was for the making of specific articles, to be made in Illinois, and delivered to the purchaser in North Carolina. The party who contracts for a picture and a frame designed for it, or a piece of machinery of a peculiar design, to be made by a certain person or manufacturer in another state, contracts for the skill of that particular artist or maker, and the tender of an article of the same general character, originating from any other source would not make a compliance with the terms of the contract. If the contract is to be performed according to its terms the article must be made in one state and sent into another. This necessarily involves interstate commerce. The pictures and frames were made in Chicago, presumably by the persons for whose skill the purchasers had contracted, and were delivered in Greensboro, North Carolina, in literal compliance with the contract."

A reference to the opinion in the Caldwell case will show how absurd is the reasoning of the court below in respect to the above propositions. There is not one word in that case that would justify those conclusions. Is there anything in the Caldwell case to show that the purchasers of the "pictures and frames" contracted for the special skill of any person or persons in the making of the pictures and frames or that the

decision in that case hinged on any such question? If there is we have been unable to find it. There is nothing whatever said in the Caldwell case that conveys the slightest intimation on which to base a holding that this case is different from that on account of the difference in the character of the goods.

We are unable to discover either from the facts or the opinion what kind of pictures and frames were there involved or that the Chicago Portrait Company was the manufacturer of either the pictures or the frames. The word "designed" as used by Mr. Justice Shiras plainly means "intended." He uses the two words interchangeably as will be seen by a reference to his opinion. Not only is there no ground for the distinction attempted to be drawn by the court below, but it is manifest that this court never intended to construe the commerce clause of the Constitution as giving to "pictures and frames" greater rights than it does to other legitimate articles of commerce.

The point on which the court below distinguished this case from the Caldwell case would, were it sustained, operate to the same effect against *"Stationery," "Tea," "Sewing Machines," "Whiskey,"* and every other article of commerce that has been involved in one way or another in cases decided by this court. To say that brooms are not articles of commerce is to place them below "Whiskey" and "Beer," which have been repeatedly held by this court to be legitimate articles of commerce. *Leisy* v. *Hardin,* 135 U. S., 100. Under the theory of the court below every article imported into one state from another state and delivered in the manner employed in the Caldwell case and the "C. O. D." cases would have to be manufactured or produced by persons for whose

skill the purchaser especially contracts. The imagination will readily picture some very ridiculous results to which such a doctrine would lead.

The learned court below showed much confusion in deciding this case. We never claimed that the individual brooms were "original packages" and therefore entitled to protection on that ground, as that court indicates in its opinion, (Record, p. 18). On the other hand, we claimed that the shipment of the brooms in the manner employed was only for convenience in transportation and the doctrine of "original packages" was not involved; that the brooms were not brought into Pennsylvania to be put up for sale, but to be delivered to purchasers in pursuance of contracts of sale previously made.

The court below refers to the case of *Austin* v. *Tennessee*, 179 U. S., 343, to support its theory of "original packages." The facts in that case are so completely different from the facts here, that it is needless to discuss the question. We simply say that in that case cigarettes were put on sale by a dealer, after the boxes containing them had been delivered to him in a large basket by an express company. The question involved was not the question of transportation, but of whether the cigarette boxes were "original packages" and protected until after a sale had taken place.

Our position on this point is fully sustained by the decision of this court in the case of Caldwell v. North Carolina, infra, and other cases. The distinction between this case and the Austin case is clear. It is plain that the Superior Court erred and that the reasoning by which that court reached the above conclusions is purely artificial.

The States Cannot Invoke Their Police Power for the Purpose of Regulating Commerce Among the States That is National in its Character.

It was strongly urged in the court below by the counsel for the Commonwealth that the Sunbury ordinance was a police regulation, and, therefore, within the power of the borough, under the authority of the state, to enforce, even as against interstate commerce. The court below sustained the claim of the Commonwealth that this ordinance was a police regulation, but did not sustain the claim that it could be enforced against interstate commerce. It held in effect that it could be enforced against the business of the plaintiff in error because that business was not interstate commerce, but the domestic commerce of Pennsylvania and therefore subject to its laws and ordinances.

As to the nature of this ordinance the court below said, (Record, p. 12):

> "The authority of the borough to require persons canvassing from house to house and upon the streets, for the purpose of selling goods at retail, or delivering goods in pursuance of orders obtained by such canvassing, to take out a license, and to impose a penalty for the violation of such an ordinance is within the *police power* delegated by the general borough law of April 13, 1851, P. L. 320; *Borough of Warren* v. *Geer,* 117 Pa., 207; *North Wales Borough* v. *Brownbach,* 10 Pa. Superior Ct., 227; *North Wales Borough* v. *Brownbach,* 194 Pa., 609; *Mechanicsburg Borough* v. *Koons,* 10 Pa. Superior Ct., 131."

In the case of Titusville v. Brennan,—Pa. St.—the Supreme Court of Pennsylvania *held in the most positive terms* that

the ordinance there in question was a police regulation and the commerce was subject to its control.

That decision of the Supreme Court of Pennsylvania was reversed by this court in the case of *Brennan* v. *Titusville,* 153 U. S., 289. This court, in that case, discusses the question of whether or not the ordinance was a police regulation, holding, that it was a license for general revenue purposes within its very declarations. This court, however, regarded that question as of no importance as bearing on the case. Mr. Justice Brewer in that case at page 298 said:

> "*Even if those declarations had been the reverse, and the license in terms been exacted as a police regulation, that would not conclude this question, for whatever the reason given to justify, or the power involved to sustain the acts of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained.*" * * * "*Thus in, New Orleans Gas Company* v. *Louisiana Light and Heat Producing and Mfg. Co.,* 115 U. S., 650, 661, this court by Mr. Justice Harlan said: 'Definitions of the police power must, however, be taken subject to the condition that the state cannot in its exercise for any purpose whatever, encroach upon the powers of the general government, or the rights granted or secured by the supreme law of the land.'
>
> "In *Henderson* against *Mayor of New York,* 92 U. S., 250, the court speaking by Mr. Justice Miller said: * * * 'that no definition of the police power and no urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of congress by the constitution.'
>
> "And in *Railroad Company* v. *Husen,* 95 U. S., 465, Mr. Justice Strong, delivering the opinion of the court, said: " 'Under color of it,' " the police power, 'objects not within its scope cannot be secured at the expense of the protection afforded by the Federal constitution.'
>
> "In *Walling* v. *Michigan,* 116 U. S., 446, 460, in the opinion delivered by Mr. Justice Bradley it was said:

'The police power cannot be set up to control inhibitions of the Federal constitution or the power of the United States government created thereby.' "

Continuing, Mr. Justice Brewer said:

"We think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon inter-state commerce can be imposed by the state without the assent of congress, and the silence of congress in respect to any matter of inter-state commerce is equivalent to a declaration on its part that it should be absolutely free.

"That this license tax is a burden upon inter-state commerce is not open to question." (Italics are counsels.)

As was suggested in the Titusville case, it must be borne in mind that the goods delivered by Rearick were legitimate subjects of commerce. There is no charge that they were in any manner injurious to the health or general welfare of the community. "The ordinance is not one designed to protect from imposition minors, habitual drunkards, or persons under any other affliction of disability. There is no discrimination except between manufacturers and licensed merchants on the one hand and the rest of the community on the other. *Unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it cannot be for the privilege of selling to the rest of the community."* (*Brennan* v. *Titusville*, 153 U. S., 289, 298.) Nor is there any provision in the ordinance for the inspection of goods offered for sale or delivery to determine their character as unwholesome or deleterious.

A comparison of the ordinance under which Rearick was arrested with the Titusville ordinance discussed above, will reveal the fact that they are almost identical in their provisions except that this ordinance does not state that it is for general

revenue purposes. Sections 12 and 18 of the Titusville ordinance are for all purposes like the Sunbury ordinance here in question. Whether regarded as a tax or a police regulation, the one is as impotent as the other to regulate commerce among the states. The holding of this court respecting the Titusville ordinance is applicable in the fullest sense to this Sunbury ordinance as applied to the facts of this case. We have established beyond any possibility of equivocation that the plaintiff in error, when he delivered the goods in Sunbury, was engaged in inter-state commerce. *The ordinance therefore was a direct burden upon inter-state commerce, for it required payment for the privilege of exercising two of the constituents of commerce—the sale and the transportation of goods. In whatever light it may be regarded it is void as being a direct burden upon that commerce.* The numerous authorities cited heretofore have fully established this doctrine.

We believe that we have now disposed of all the questions raised upon the commerce feature of this case and have shown conclusively, both by reason and authority, that the business of the plaintiff in error, as appears by the facts, was inter-state commerce and free from local interference, burdens or tax.

It remains for us to show that this Sunbury ordinance is a denial of the equal protection of the laws and is therefore in violation of the Fourteenth Amendment to the Federal Constitution. It is therefore not law and a conviction under it cannot be sustained in any case.

II.

THE ORDINANCE IN QUESTION IS UNCONSTITUTIONAL AND VOID FOR THE REASON THAT IT DISCRIMINATES BETWEEN PERSONS AND DENIES THE EQUAL PROTECTION OF THE LAWS. IT GIVES RIGHTS, PRIVILEGES AND IMMUNITIES TO SOME WHICH IT DENIES TO OTHERS. IT IS IN VIOLATION OF THE LAST CLAUSE OF SECTION 1, FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES, THAT, "NO STATE * * * SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

A.

As to the Discrimination in Favor of the Producer and Manufacturer.

It will be seen that the Sunbury ordinance (Record, p. 24), makes a special exemption in favor of the producer, and manufacturer. They are by an express provision of the ordinance taken out from its general terms, and excepted from its operation. They are placed in a favored class. They are not required to procure a license to sell or deliver their goods, nor are they subject to any penalty for selling or delivering them in any manner they choose. Persons who are not producers nor manufacturers, if they would "solicit orders for their goods at retail" or "deliver them at retail," by going from house to house in the borough of Sunbury, must, by the terms of the ordinance, first procure a license for the privilege, and, on failure to do so, be subject to the prescribed penalty. The producer or manufacturer may deliver the same kind of goods that the non-producer or non-manufacturer delivers;

the former need not take out a license, the latter must. Has the former class greater civil or personal rights than the latter under the constitution so that the borough may legally discriminate in favor of the one and against the other? Deprive one person of his liberty and property for doing precisely the same thing that another may do without suffering any penalty whatever. It is claimed that this is a police regulation for the protection of the inhabitants of the borough. Can police regulations validly discriminate in such manner? No valid police regulation may discriminate in the manner in which the Sunbury ordinance does. It would be the grossest inequality and the most flagrant denial of the equal protection of the laws to imprison one person for doing the same thing that is no offense if done by another. No reason can justify such an invasion of the rights of the persons against whom this ordinance is directed.

Police regulations for the protection of the community must, to be valid, be expressed in general terms. Where an exception is made of a person or class of persons, as is done by this ordinance there is no protection for the community. Can it be assumed that the producer or manufacturer is more honest than one who does not manufacture or produce the article which he sells? It would be as reasonable to except them from laws against theft or other crime. If this Sunbury ordinance is a police measure for the protection of the inhabitants of that borough it cannot draw a distinction between producers and non-producers, manufacturers and non-manufacturers, 'for the distinction would have no relation to the purpose of such an ordinance, which is the protection of the public. To accomplish this end it is just as essential that the manufacturers and producers be required to take out a license as any other

member of the community.' (*State* v. *Whitcomb,* infra.) A statute of Wisconsin that made similar discriminations was before the Supreme Court of that state in the recent case of *State* v. *Whitcomb,* 99 Northwestern Rep., 468. Justice Dodge delivering the opinion of the court in that case said at page 471:

> "Again what possible reason, revenue, or police can justify discrimination between the farmer or mechanic whose goods were purchased three months earlier and one who offers to the community newly purchased goods of the same kind? *Is one more honest than the other? If so, which? Is one* more of an expense to protect against? Is either more certain than the other to have otherwise contributed to the public revenues, or better able to contribute? These questions admit of none but negative answers. Is the wooden nutmeg any less meretricious because the man who brings it here and peddles it is hired by the Connecticut mechanic of whose lathe it is the fruit than if the same man were employed by the mechanic's next door neighbor, a merchant? *State* v. *Wagner,* 69 Minn., 205; *McRoberts* v. *Sullivan,* 67 Ill. App., 435. Clearly, such classification as this cannot have sprung from any general public purpose, nor germane to any. *It is not equal protection of the laws to all people similarly situated with reference to that law."*
>
> "Another glaring false classification is presented by the exemption of dealers in agriculture implements maintaining permanent places of business, or keepers of retail meat markets, or fish dealers, and sellers of fruits and vegetables in cities of the first class, selling their respective wares. What consideration of public welfare could exclude a retail grocer from peddling his wares, while permitting the keeper of an adjoining meat market to peddle perhaps the same articles, or exempt the dealer in plows from the restriction placed on the dealer in paints, fence wire, or any other merchandise, we confess our inability to discover. Under this act the agent of this appellant's employer and an agent of the keeper of a nearby meat market may start together on the same vehicle, each with

his samples—tea, coffee, sugar, in one satchel, ham, bacon, cured meats, and lard in the other; may visit the same farmer in the same vehicle, one take an order for coffee and sugar, the other for lard and bacon. The first is a criminal, the other not. The illustration leaves nothing to be said. It is discrimination between individuals of the same class, not between legitimate classes."

In the case of *State* v. *Wegner*, 69 Minn., 205, a license statute making similar discriminations to this ordinance was before the Supreme Court of Minnesota. The case did not involve the question of whether the statute violated the Fourteenth Amendment but whether it violated a similar provision of the constitution of Minnesota, which was equivalent to the same thing.

In delivering the opinion of the court in that case, Canty, J., said:

"This court has often held that, under these sections, the legislature must treat alike all who are in the same condition, must make the law apply to a whole class, and cannot make a law which applies only to a part of a class. And the class must be selected on some distinction, or be defined by some principle, which might naturally or properly distinguish it from all other classes. We are of the opinion that these rules have not been complied with in the framing of this statute. * * *

"Thus, the manufacturer is allowed, by himself and his employe, to peddle without license the wares of his own manufacture. The legislature can regulate the business of hawkers or peddlers only for the purpose of preventing it from becoming a nuisance. The business is inherently moral and legitimate in itself, but there is in it a tendency to abuse, as many irresponsible, clamorous and intrusive persons engaged in it. It cannot be held, on any sound principle, that peddling may not become a nuisance as when the peddler or his employer has manufactured the wares he peddles, as when some one else has manufactured them. This act allows the manufacturer of brooms, tinware, patent medicines, or any other articles, whether

manufactured in this state or elsewhere to employ the most obstreperous and irresponsible peddlers to hawk his wares for him without license, while no peddler can buy the same goods from the manufacturer and peddle them on his own account without a license. For the purpose of a law to prevent peddling from becoming a nuisance, we cannot on any proper basis of classification, distinguish between the peddling of goods by the manufacturer and his servant, and the peddling of the same goods by the purchaser from the manufacturer. Thus, when the object of a law was to prohibit the nuisance arising from the emitting of dense smoke from chimneys, the law was held unconstitutional, because it excepted from the operation of the act the chimneys of manufacturing establishments. *State* v. *Sheriff*, 48 Minn., 239. The distinction was held to be arbitrary and the classification improper. In the same manner as the act here in question attempts to distinguish between peddling by the manufacutrer and his servant and peddling by the purchaser from the manufacturer, it attempts to distinguish between peddling by the farmer or nurseryman and peddling by the purchaser from such farmer or nurseryman; between peddling by the butcher and peddling by the purchaser from the butcher. These distinctions are arbitrary and no proper basis for classification. This disposes of the case. The act in question is unconstitutional, and the conviction under it is illegal and void."

The reasoning of the Supreme Courts of Wisconsin and Minnesota, in the cases from which we have just quoted has especial application to the Sunbury ordinance.

In the case of Flatau v. Mansfield, 14 Ohio C. C., 596, Adams, J., said:

"Under this act, and we must judge this act by its terms as they appear upon the statute books, two dealers in the same line of goods, in the same town and on the the same street, may have stores that in all respects, are identical in the character of their fixtures, the character of the stock of goods that they are selling, and they may be selling in exactly the same manner; both of them may

> be citizens of the same town, one of them a permanent dealer in the business who has been carrying on business for many years, and the other, perhaps, a wholesale dealer, who has taken a stock of goods to secure a debt, and is anxious to dispose of this stock and get his money. Under this law, one man is free from any license fee or tax, and the other can be required to pay any sum that the council of the city or village may deem expedient. The Statement of that case to an unprejudiced mind in a free country shocks the sense of justice, but that is not sufficient to make the law unconstitutional."

Adams, J., then quoted from Section 2 of the Bill of Rights of the Ohio Constitution, and said:

> "That is all I care to read from that section. 'Government is instituted for their equal protection and benefit.' We think this section of the statute clearly violates the principles stated in the Bill of Rights that all laws must be for the equal protection and benefit of the people."

The Supreme Court of Ohio held the same statute unconstitutional in the case of *Newark* v. *Flatau*, Supreme Court Decisions, Unreported Cases, 372 (53 O. St., 660). The reasoning of the Ohio Circuit Court above quoted is especially applicable to this ordinance. There have been a number of cases decided by other circuit courts in Ohio that have involved precisely the same questions as we are now discussing and those courts have uniformly held that discriminations in an ordinance, like those made by the Sunbury ordinance, render it unconstitutional and void because denying the equal protection of the laws. *Cadiz* v. *Marshall*, Harrison County Circuit Court, unreported; Warsaw v. Green, Coshocton County Circuit Court, unreported.

At this point we wish to call the court's attention to the case of Conolly v. Union Sewer Pipe Company, 184 U. S.,

540. In that case the question of the validity of an act of the legislature of Illinois, known as the "Anti-Trust Act," was involved. That act prohibited the combination of capital, skill or acts and made it a penalty to violate the same.

The act further declared illegal and unenforceable any contract which might be made by such combinations. Section 99 of the act made this provision:

> *"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."*

The Union Sewer Pipe Company, an Ohio corporation, brought an action to recover from the defendant, Thomas Connolly, on two promissory notes, given on account of the purchase of Akron pipe from the plaintiff. The defendant, among other defenses, pleaded the Anti-Trust Act of Illinois as a defense to the action. The case came to this court on error from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice Harlan in delivering the opinion of the court says, at pages 558, 559 and 560:

> "But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for the purpose of defeating the plaintiff's claims in these actions.
>
> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which as often stated by this court, were not included in the grants of power to the general government and therefore were reserved to the states, when the constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state even

when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden,* 9 Wheat 1, 210; *Suinot* v. *Davenport,* 22 How., 227, 243; *Missouri, K. & T. R. R. Co.* v. *Haber,* 169 U. S., 613, 626.

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' *Missouri* v. *Lewis,* 101 U. S., 22, 31." "We have also said: The Fourteenth Amendment, in declaring 'that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances, *in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property;* that they should have like access to the courts of the

country for the protection of their persons and property; the prevention and redress of wrong, and the *enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions,* and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as prescribed to all for like offenses.' *Barbier* v. *Connolly,* 113 U. S., 27. This language was cited with approval in *Yick Wo.* v. *Hopkins,* 118 U. S., 356, 369, in which it was also said that, 'The equal protection of the laws is a pledge of protection of equal laws.' In *Hayes* v. *Missouri,* 120 U. S., 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the object to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and conditions both in the privileges conferred, and in the liabilities imposed.' 'Due process of law and the equal protection of the laws,' this court has said 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the power of government.' *Duncan* v. *Missouri,* 152 U. S., 377, 382.

"Many other cases in this court are to like effect. These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all except producers* of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statutes and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of the state agriculturalists and raisers of live stock, are all in the same general class, that is, *that they are all alike engaged in domestic trade which is, of right open to all,* subject to such regulations, applicable alike to all in like

conditions, as the state may legally prescribe. The difficulty is not met by saying that, generally speaking, the state in enacting laws may in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis, * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, * * * some difference which bears a just and proper relation to the attempted classification,—and not a mere arbitrary selection.' "

After discussing some cases in which a classification has been made for taxation purposes, Justice Harlan goes on to say:

> *"It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce, such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary and plainly denies the equal protection of the laws to those against whom it discriminates."* (The italics are counsels.)

This court also held that since the legislature had exempted one class it could not be presumed that it would have passed

the act otherwise, and therefore the whole act must fail. The learned court below said (Record, p. 19):

> "All who sell by canvassing and delivering from house to house, articles, "Not of their own production or manufacture are required to procure a license, manufacturers and producers are only excepted so long as their sales are confined to the articles produced by them, when such persons attempt to sell articles produced by others they must, under the provisions of this ordinance, procure a license. The ordinance therefore, requires all dealers, those who buy to sell again, to take out a license."

This reasoning would have been equally applicable in the case of the Illinois "Anti-Trust" Act. Under that act producers and raisers were exempted only so long as the combination related to articles produced or live stock raised by them. When those persons attempted to combine with reference to like things not produced or raised by themselves or of any other articles they violated the statute.

There is absolutely no difference between the "Anti-Trust" act and this ordinance in respect to this discrimination. There can be no doubt then that the learned court below erred in the above quotation. That court held this ordinance to be a police regulation. In such case how is it possible to make discriminations. Is it not just as necessary to protect against the manufacturer and producer as against others? Every article sold is manufactured or produced by some one, and a bad article is just as bad in the hands of the manufacturer or producer as it is in the hands of the person to whom he sells it. Neither can there be any presumption that the one class is better morally than the other and therefore more likely to obey the law. These are the things that condemn this ordinance.

This Sunbury ordinance is a general ordinance making it an offense punishable by fine and imprisonment for one person

to do an act that is directly connected with trade and commerce while another person may do precisely the same thing without molestation. This ordinance exempts from its operation manufacturers, producers and others,—the Illinois act exempted the producer or raiser of agricultural products and live stocks. No possible distinction can be drawn between the cases on the point under discussion. The statute and the ordinance both deny the equal protection of the laws.

The learned court below held that the discriminations made by the ordinance were a proper classification and cited the case of *American Sugar Refining Company v. Louisiana,* 179 U. S., 89. That case involved the question of whether a statute that levied a tax on the refiners of sugar that exempted planters and farmers who refine their own sugar, denied the equal protection of the laws. The tax there involved was a tax merely, and the question of its constitutionality arose in a civil action for the recovery of the amount of the tax. The case involved the taxing power and had no similarity whatever to an ordinance of this kind, where the tax involved, as held by the court below, is in the nature of a police regulation. The question involved in the case cited, was as to the power of raising revenue, and had no relation to the subject of regulating the business of manufacturing sugar.

It was the claim of the commonwealth, and the court below held, in positive terms, that this ordinance was enacted in the exercise of the police power under authoriity duly delegated by the state. (Record, p. 12.) In order to sustain the ordinance against the claim that it is a denial of the equal protection of the laws, and, therefore, in violation of the Fourteenth Amendment to the Federal Constitution, the court below cited a case on a subject, that that court held was not involved in this case,

viz., the taxing power. The court below, itself, draws the distinction between the Sunbury ordinance and the Louisiana statute by holding the one to be a police regulation while it refers to the other, a taxing measure, in support of its decision. The confusion of the learned court below respecting this subject is evident.

The discriminations made by this ordinance can not be disposed of by calling it classification. Is it possible to make a proper classification of persons engaged in precisely the same occupation so as to make criminals out of some but not out of others? Is not such "classification" purely *arbitrary selection* of the worst possible sort? Is it a crime to trade? Is it a crime to sell and deliver goods that are the legitimate subjects of commerce? This is a right possessed by every freeman and every law that affects this right in the least must be of equal operation on all.

It is the almost universal custom in cities the size of Sunbury for delivery wagons to be employed by business houses to deliver goods to purchasers. These business houses do not come within the classes exempted by this ordinance. But does any one suppose that each person who delivers goods for the business houses of Sunbury pays for a license under this ordinance —pays the sum of $150 per year for the sole privilege of delivering merchandise to purchasers, or is prosecuted for a failure to pay? This would be absurd, but these questions serve to show the purpose of the ordinance. It is well known that ordinances of this character are neither intended as police regulations or revenue measures, but are secretly for the purpose of stifling competition in the interest of local dealers. The exemption made of favored classes is conclusive proof of this. If the ordinance were in good faith, a police regulation, it

would be of general application. It possesses none of the distinguishing features of a proper police regulation as we have pointed out above. It imposes burdens on one class of individuals that it does not impose on another class similarly situated with reference thereto. It casts one person into prison for doing an act which if done by another is no crime. It is depriving the one of his liberty and property while letting another go free.

It is unnecessary to dwell upon the value of liberty to mankind. It is at least the second in value of man's possessions and by many regarded as first. How then can an ordinance, however it may be regarded, which possesses such flagrantly unequal provisions be enforced so as to deprive persons of this fundamental right? Is it not plain that an ordinance of this character is an arbitrary exercise of the power of government, and is therefore unreasonable, unconstitutional and void?

The following declarations by Mr. Justice Harlan in the Connolly case is to the point:

> *"Equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that no impediment should be interposed to the the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens could be laid upon one than are laid upon others in the same calling and condition."* (The italics are counsels.)

B.

The Sunbury Ordinance Discriminates Against Persons who "Sell at Retail by Sample or Otherwise," or who "Solicit Orders at Retail," or "Who Solicit Orders for Sell or Deliver at *Retail*, Goods not of Their Own Production or Manufacture.

It will be seen that there is an arbitrary selection made here between one who solicits orders for and delivers goods at retail and another who solicits orders for and delivers goods at wholesale.

We are unable to conceive how one person going from place to place, taking orders and delivering merchandise, can have greater personal or civil rights than another who does the same things. The fact that one delivers goods to a merchant at his store should not entitle him to greater rights in Sunbury than one who takes the order and delivers goods to another person in the borough. Because the person to whom goods are delivered is a merchant or dealer is not a reason why the person who delivers them should be exempt from the operation of a general ordinance which makes it any offense to deliver goods without license. Rights under the law are based on one's rights as an individual and not upon any business in which he may be engaged. This exemption of the Sunbury ordinance clearly shows its object, which is, as pointed out in the next preceding subdivision of this brief, to be, for the sole purpose of creating a monopoly in the local dealers. If a man solicits orders from or delivers merchandise to dealers, whether or not the same be of his own production or manufacture, he is not required to take out a license. This shows the utter absurdity of the claim that this ordinance is a

just and proper police regulation or for the purpose of raising revenue, though the latter may be the result of its operation. Can it be claimed that merchants and dealers are a superior class, more capable of judging of the quality of goods and therefore less in need of protection than other persons? Who is to judge of this? There may be and undoubtedly are in Sunbury retired dealers, to whom a sale without license could not be made without a violation of this ordinance. Why should there be a discrimination between the person who sells to the active dealer and the one who sells to a person who retired from business but yesterday? Is not such discrimination the plain denial of the equal protection of the laws? Persons who usually purchase for a household are as familiar with the quality of the goods as our dealers, and quite as capable of judging. If this ordinance were a just police regulation it would be of equal operation on all. It would protect the people of Sunbury against their local dealers as much as against others. An offense is equally great in the eyes of the law whoever may commit it, and for the law to provide otherwise is the most arbitrary and unjust exercise of the power of government.

Under this ordinance A, a wholesaler, has the privilege free and unstricted of delivering to X, a dealer, 25 pounds of coffee, while B, a retailer, cannot deliver 25 pounds of the same commodity to Y, an inhabitant not engaged in trade, without having to pay for the privilege, and on failure to pay, be criminally liable. Neither A or B, in the case supposed, has his place of business within the borough and both employs the same method in delivering the coffee, which neither produces nor manufactures. This illustration shows the unequal operation of the ordinance. A and B are both engaged in trade,

"which is, of right open to all, subject to such regulations applicable alike to all in like conditions, as the state may legally prescribe." *Conolly* v. *Union Sewer Pipe Co.*, supra. This the ordinance plainly denies and it is therefore unconstitutional and void.

C.

THE SUNBURY ORDINANCE HERE IN QUESTION DISCRIMINATES IN FAVOR OF MERCHANTS AND DEALERS IN THE BOROUGH ON THE ONE SIDE AND AGAINST THE REST OF THE WHOLE BODY OF THE INHABITANTS OF THE BOROUGH ON THE OTHER.

We have just seen how a person may go to a merchant of the borough and take his order for such goods as he may desire to purchase, and deliver the same to him without being required to take out a license for the privilege. If, however, a person goes to the house of an individual to take his order for such goods as he may desire to purchase, and subsequently delivers the same, he, the seller, must first procure a license, that is, secure a permit, and, on failure to do so, be punished for the offense. In other words, A, B and C, who are merchants in the borough, can purchase goods from an agent who is unhampered by a license tax, who is free to move from place to place and take orders for, and deliver goods without his right to do so being questioned by anyone. On the other hand, E, F and G, who are not merchants, but common, ordinary individuals, cannot give orders for goods to an agent in their own houses and have the same delivered to them without such agent shall first obtain a license for the privilege. It is very clear that an ordinance of this kind not only operates on the person who takes the orders but also on the purchasers. The merchants may contract with a man who is free and un-

hampered, while the non-merchant must contract with a man who brings the burden of this license ordinance upon his shoulders. This burden, if not prohibitive, at least tends to restrict, to hamper, to annoy, to interfere and to obstruct a salesman in many ways to induce him to stay away from prospective customers. This not only interferes with the right of the agent to make contracts of sale free and unhampered, but reacts and has the same effect upon the purchasers. The ordinance is a plain discrimination in favor of a merchant and against a non-merchant. A man's calling, whatever it may be, confers on him no greater personal or civil rights, than is possessed by other individuals. Whatever occupation he may engage in, he is but an individual still, standing on the same ground and enjoying the same personal and civil rights, no more, no less, than other individuals. The question is, has any person in Sunbury any greater rights and privileges under the constitution than another person? Can one exercise the great personal right, which every freeman has, the right to make contracts free from restraint, while another cannot? If there is the slightest discrimination in this respect, the ordinance must fail. In the case of *Brennan* v. *Titusville,* 153 U. S., 289, Mr. Justice Brewer speaking of a similar provision of an ordinance, said:

> *"There is no discrimination except between manufacturers and licensed merchants on the one hand and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants it cannot be to tax for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made."* (The italics are counsels.)

This language has peculiar application to the question now being discussed. There can be no just law that restricts one set of individuals in their right to make contracts respecting the purchase of property, while it places no restriction on the right of others to make contracts respecting the purchase of similar property in a similar manner. The right of contract is one of the very greatest rights which men possess. In a civilized state of society it is necessary to their very existence. They get food, shelter and clothing by contract, all of which are necessary to preserve their happiness, comfort, health and life. If the right of contract be restricted in one, in the least degree, does he, it may be asked, enjoy the same protection of the laws, as another in whom the right is unrestricted? The Supreme Court of Ohio in discussing a similar ordinance said, "It places an unwarranted impediment in the way of the buyer and seller in acquiring and disposing of property." *Sipe* v. *Murphy,* 49 O. St., 546. This ordinance is an impediment in the way of the right of the inhabitants of the borough of Sunbury, to acquire and possess property. It is intended to be an impediment in the way of the right of a certain class,—the largest class of individuals in Sunbury, to have free commercial intercourse with people residing outside that borough. This was suggested by Mr. Justice Bradley in the *Robbins case,* supra.

CONCLUSION.

We have demonstrated beyond any possible question that the court below erred in holding that the contracts of sale made by Kunkle did not necessarily involve commerce among the states. But even if the theory of the court below respecting the contracts were correct it would not affect this case. *The delivery of the goods by Rearick that were on their way from*

the seller in Ohio to the buyers in Pennsylvania, was, independently of any other fact, inter-state commerce. However, the sale might have been made, whether by soliciting of orders by letter, by telegraph or by other method, the delivery of the goods from another state, in the manner employed by the plaintiff in error, was inter-state commerce and protected from local interference, burden, or tax, regardless of the nature of the statute or ordinance imposing it, by the commerce clause of the Federal Constitution.

The ordinance is void in itself for the reason that it makes arbitrary discriminations between persons and thus denies the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. *In no case* then, could this ordinance be made the basis of a valid conviction.

The plaintiff in error is clearly entitled to a reversal of the judgment of the court below and to his discharge.

Respectfully submitted,

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APPENDIX.

Sunbury Ordinance of December 9, 1899.

An Ordinance, To provide for the licensing of canvassers and all other persons who sell at retail, by sample or otherwise, or who solicit orders at retail or who solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the Borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise or fruits, not of their own production or manufacture, and imposing a penalty for a violation of this ordinance.

Section 1. Be it enacted and ordained by the Borough of Sunbury, in town council assembled, and it is hereby enacted and ordained by the authority of the same, that after the passage of this ordinance it shall be unlawful for any person or persons to sell at retail, by sample or otherwise, or to solicit orders at retail, or to solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the Borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise or fruits, not of their own manufacture or production, without first obtaining from the chief burgess of the Borough of Sunbury a license for such purpose.

Section 2. The license fee required to be paid under this ordinance shall be as follows: For one day, two dollars; for one week, ten dollars; for one month, twenty dollars; for three months, fifty dollars; for six months, one hundred dollars; for one year, one hundred and fifty dollars.

Section 3. Any person or persons violating this ordinance by selling, canvassing, soliciting or delivering as aforesaid, without having first obtained and paid for a license as required in sections one and two of this ordinance, shall, upon conviction thereof before any magistrate or justice of the peace residing in the said borough, forfeit and pay a fine not exceeding fifty dollars and not less than twenty-five dollars, for the use of the borough aforesaid, for each and every offense, together with costs of prosecution; the costs of the magistrate, justice of the peace and constable to be the same as the costs fixed by law for them in similar cases. And any person or persons so convicted and fined, in default of payment thereof, together with costs aforesaid, shall be forthwith confined in the common jail for the county of Northumberland, for a period of not less than fifteen and not more than ninety days until such time as the costs and fine imposed, together with the prison charges accrued, be fully paid and satisfied.

Section 4. The word "retail" as used in this ordinance shall be construed to mean in small quantities, such as are usually immediately called for by customers.

Section 5. All ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed.

Approved December 9, 1899.

P. H. Moore, Chief Burgess.

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(19,801)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 47.

Office Supreme Court
FILED
DEC 7 19
JAMES H. McKE

N. L. REARICK,
Plaintiff in Error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

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VS.

THE COMMONWEALTH OF PENNSYLVANIA,

DEFENDANT IN ERROR.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

Our object in filing this reply is to examine the position assumed by the defendant in error with respect to one or two features of the case and especially to determine what bearing, if any, the cases cited have on the questions here involved.

The defendant in error reviews at length a number of liquor cases that have arisen in Pennsylvania (Brief, pp. 4-10), with the object of applying the rules there laid down to the present case. It will be observed that in all of those cases the commerce was the domestic commerce of Pennsylvania and had no relation to the subject of interstate commerce.

The cases referred to are wholly inapplicable to the questions here in controversy. Even though they were cases that effected interstate commerce, the rules there laid down would be at variance with the decisions of this court on the same subject, and they would therefore be of no value in determining the rule applicable to this case.

See the cases of

Caldwell v. North Carolina, 187 U. S., 622;
N. & W. R. R. Co. v. Sims, 191 U. S., 441; and
American Express Co. v. Iowa, 196 U. S., 133.

The defendant in error endeavors to establish the point that The Citizens' Wholesale Supply Company never extended credit to the purchasers of these goods, but retained title to the same until Rearick made the delivery, and collected the money therefor. It is claimed that the sale was for this reason made at the time of delivery and the transaction was therefore subject to the borough ordinance. This is a wholly unimportant question in this case, for this court has repeatedly held, that, the C. O. D. business, when the goods pass from one state for delivery in another, is interstate commerce.

In *The American Express Co. v. Iowa*, 196 U. S., 133, it was distinctly held that the transfer of the title to goods may be postponed until the delivery thereof and that the C. O. D. business as usually carried on is a proper and legitimate means by which commerce among the states may be transacted and is fully protected from the interference of local or state laws by the commerce clause of the constitution. The cases above cited have fully established this doctrine both where a private agent, as in the *Caldwell* case, *supra*, or a public agent as in the *American Express Co.* case, *supra*, is employed in the delivery.

It is claimed by the defendant in error that there was no mutuality of contract between the Citizens' Wholesale Supply Company and the purchasers of these goods in Sunbury and that therefore the sale took place when Rearick delivered the articles. (Brief, pp. 9 and 10.) The agreed statement of facts (Record, p. 28), shows that Kunkle, the agent of the Citizens' Wholesale Supply Company, solicited and took orders for the goods in Sunbury by exhibiting examples.

Were these orders not contracts for the sale of these goods, for goods which were then in another state?

The statement of facts in this case with reference to the soliciting of orders is almost identically like the facts in *Brennan v. Titusville*, 153 U. S., 289. Also see *Asher v. Texas*, 128 U. S., 129; *Stoutenburg v. Hennick*, 129 U. S., 140; *Caldwell v. North Carolina*, 187 U. S., 622; and other cases cited in our brief heretofore filed.

The defendant in error claims that the Citizens' Wholesale Supply Company never accepted the orders taken by Kunkle. What acceptance was necessary other than had been made by Kunkle when he took the orders as the agent of the company? If any other acceptance was necessary was there not such an acceptance when the company received the orders, packed the goods to fill the same, marked the boxes containing them and also each of the brooms with the name of the proper purchaser and shipped the boxes and brooms to Rearick, its agent at Sunbury, for delivery to the purchasers?

A strong effort is made by the defendant in error to bring this case within the rules laid down in such cases as *Austin v. Tennessee*, 179 U. S., 343, and *May & Co. v. New Orleans*, 178 U. S., 496. (Brief, pp. 12 and 14.) An examination of those cases will show that the rules there laid down have no

application to the present case. In the *Austin* case, *supra*, the facts were these: A manufacturer of cigarettes at Durham, N. C., piled a number of packages of cigarettes on the floor of its warehouse in Durham. These packages had no covering or inclosure of any kind around or about them. While so piled on the floor of the warehouse of the American Tobacco Company at Durham they were shipped to the defendant, Austin, in Monroe county, Tennessee. The Tobacco Company notified the "Southern Express Company to come and get them, and the said company, by its agent, took them, the said inclosed packages, and placed them in an open basket, already and heretofore in the possession of said Southern Express Company, and these packages were brought to the place of business of the defendant by an agent of said express company in the same open basket in which they had been placed by said express company at Durham, N. C., and by said agent lifted from said basket on to the counter in the place of business of defendant, and so delivered to and receipted for by defendant; that said basket was not left with defendant at all, but was carried away from defendant's place of business by said agent of said express company immediately upon the delivery of said packages of cigarettes; that defendant immediately upon his receipt of said packages, as aforesaid, put them on sale, without breaking, and sold one of them on November 1, 1897, to W. G. Brown, an adult resident of said Monroe county." Austin was convicted and fined for the sale of the cigarettes. This court by a divided vote sustained the conviction.

It will be seen how completely different are the facts in that case from those here. There the defendant received the cigarettes and placed them on sale and for making a sale was

prosecuted. In that case Austin was the importer of the cigarettes from another state. In the present case the purchasers were the importers. It was because of their contract with the Citizens' Wholesale Supply Company that these goods came into Pennsylvania. Rearick was completing the transportation. He stood in the same position as the agent of the express company who delivered the cigarettes in the Austin case. Rearick took the goods to the person who had purchased them while they were in the State of Ohio. Austin put the cigarettes upon his shelves and waited for buyers. When a buyer came he sold a package. It was for this sale that he was prosecuted. It is plainly apparent that there is an entirely different principle involved in the Austin case. This is further shown by the fact that in cases similar to this one, like the *Caldwell* case, *supra*, no notice whatever is taken of the Austin case in the opinions of this court. The case of *Vance v. Vandercook*, 170 U. S., 451, illustrates the distinction between the two cases. In that case this court held that the State of South Carolina could not prohibit the shipment from California of wines to residents of the former state on the orders of said residents for their own use, but that the state could prohibit sales of wines in the original packages after their arrival in South Carolina.

In *May & Co. v. New Orleans*, 178 U. S., 496, referred to by the defendant in error (Brief, pp. 12 and 14), the facts were that May & Co., located in New Orleans, had "ordered on their own account" from Europe various articles of merchandise. A portion of the goods May & Co. had themselves taken orders for and a portion was for stock. When these goods came to rest in May & Co.'s store in New Orleans they were taxed as other goods. It was claimed that the goods

were in the original packages of import and therefore not liable to the tax. The facts showed that the goods to fill the orders of May & Co.'s customers were sometimes packed to themselves and sometimes they were packed with May & Co.'s stock goods. When packed separately the separate packages were sent direct to the customer, when packed with stock goods the shipping package would be opened and the goods separated. The question was whether the manufacturer's package or the shipping package was the original package. This court held the shipping package to be the original package and that the breaking of the shipping package rendered the goods liable to a general tax. In that case May & Co. ordered the goods from Europe on their own account and not on the account of their customers. The goods were sold in Europe to May & Co. and shipped from Europe to May & Co. May & Co. were the importers of all the goods.

There is no similarity whatever between this case and the *May* case. This case is concerned solely with the transportation of merchandise. The Sunbury ordinance was a direct burden upon that transportation.

It is interesting to witness the efforts which the defendant in error makes to distinguish the present case from the *Robbins, Brennan, Caldwell* and other cases, *supra.* (Brief, pp. 15-18.) That there has been a complete failure of this effort is clearly apparent. It is claimed that in the Brennan case the goods were sent direct to the purchasers, thus showing that the sale took place in Chicago, and that the vender had extended credit in Chicago to the purchasers. How this conclusion could be drawn from that case is difficult to understand. There is nothing said in that case about extending credit and the goods may have been paid for in advance for all

that can be learned from the facts. If the argument of the defendant in error were to be believed there could be no interstate commerce unless the vender extended credit. The extension of credit is of no importance whatever as the many decisions of this court on the subject of interstate commerce testify.

The answer to the claim of the defendant in error that there is a distinction between this case and the Brennan case in that there the goods were sent direct to the purchasers, is to be found in the *Caldwell* case, *supra*.

In that case it was held, as we have pointed out in our brief heretofore filed, that the goods were sent direct to the purchasers and that the only distinction between it and the Brennan case was that the vender in the *Caldwell* case employed two agents instead of one in the delivery. The fact that Rearick received these goods at the freight station and completed the delivery does not in the slightest degree effect the question.

It is further claimed by the defendant in error that in the *Brennan* case and the *Caldwell* case, *supra,* the goods ordered were especially manufactured by the venders for each particular purchaser, which was not done in the present case. (Brief, pp. 16-18.) There is nothing in those cases either in the facts or the opinions, to warrant such conclusion. The decisions of this court in those cases did not turn on any imaginary facts. We have already conclusively answered this absurd argument in our brief already filed and further consideration of the subject is unnecessary.

It is claimed that there is a distinction between this case and the *Robbins, Brennan, Caldwell* and other cases, *supra,* in that in those cases the statutes or ordinances involved, each

"contained the fatal geographical discriminating clause." Just what is meant by this is not clear. Certain it is the statutes or ordinances involved in each of those cases made no discriminations whatever against goods from other states. In the *Robbins* case the State of Tennessee insisted that the statute did not discriminate in any way against drummers representing business houses located in other states, but that Tennessee and foreign drummers were taxed alike. This court held that that did not meet the difficulty, for interstate commerce could not be taxed by the state at all even though the tax be alike on state as well as interstate commerce. In not one of the cases above referred to did the decision turn on any question of discrimination.

The defendant in error claims that even though Rearick were engaged in interstate commerce it was permissible for the borough to require payment for the privilege of carrying it on. (Brief, pp. 19-25.) A number of cases on totally different questions are cited to support this contention. The cases of *American Steel and Wire Co. v. Speed,* 192 U. S., 518, and *Brown v. Huston,* 114 U. S., 622, cited by the defendant in error involved the question of whether a state could levy a tax on merchandise that has come to rest within its borders. This court held that a state could levy such tax. In such case the merchandise has reached its destination and become a part of the general mass of property in the state. It is entirely different from a case where the merchandise is still in transit.

Emert v. Missouri, 156 U. S., 296, also referred to by the defendant in error was a peddler's case. Emert peddled sewing machines through Missouri and sought to find purchasers for them. When he found a purchaser he would concurrently sell and deliver a machine. A different rule would apply in

such case from a case where orders are taken for goods which are in another state and which are subsequently sent from that state to fill the orders as was done here.

The cases of *Woodruff v. Parham*, 75 U. S., 123, and *Hinson v. Lott*, 75 U. S., 148, have no application here. In the former case the question involved was a license tax on indiscriminate auction sales. In the latter case this court held that when the same amount of tax is placed upon liquors manufactured within the state as is placed upon imported liquors the tax on imported liquors would be valid. It seems that this is the same rule that was applied in *Brown v. Huston*, and *American Steel & Wire Co. v. Speed*, *supra*. In other words, the imported liquors had come to rest.

It will be seen that none of the cases cited by the defendant in error on this subject has any application to a case like the present. On the other hand we have shown in our brief by a long and uninterrupted line of decisions that a state can not levy any tribute, without regard to the nature of the statute or ordinance imposing it, upon interstate commerce, of the character here involved, and that any attempt on the part of the state or its political subdivisions to regulate interstate commerce by the imposition of a license tax is void.

The defendant in error makes the claim that it is within the police powers of the borough to enforce the license tax here in question even as against interstate commerce and cites some cases that refer to the police powers of the states. An examination of each of those cases will show that this court has held in those very cases that the states can not use their police powers for the purpose of regulating commerce among the states. Especially is this true where the commerce is national in its character like the sale and transportation of goods.

We have discussed this subject fully in our brief and a further consideration of the subject here is unnecesary. We wish, however, to call the attention of the court to the following language used in the brief of the defendant in error. It is said at page 26 of the brief: "It is certainly within the same power" (the police power) "to enact laws to prevent, or at least regulate the domiciliary visitations of itinerant peddlers and canvassers who assail the privacy of domestic life and who have mostly to deal with innocent women and children, defrauding them of money and property and then fleeing to other states, leaving their victims without redress." The foregoing language was used by the Supreme Court of Pennsylvania in deciding *Titusville v. Brennan*, 143 Pa., 642, which decision was afterwards reversed by this court in *Brennan v. Titusville*, 153 U. S., 289. The same doctrine was urged upon this court in that case, but this court completely disregarded it.

It is claimed by the plaintiff in error that there is a distinction between a drummer who solicits orders from dealers and a canvasser who solicits orders from persons not dealers. A quotation is given from the opinion of a "learned court," but we are not informed as to the particular court, which holds there is such distinction. That, however, is not the doctrine of this court, for that was one of the questions involved in *Brennan v. Titusville, supra*, and this court held in the most positive manner that there was no such distinction. For this court to sustain the position of the defendant in error on this point would be to hold that only dealers could engage in interstate commerce and that persons not dealers would be obliged to make their sales to, and purchases from, other states subject to the laws of the states. It is certain that the commerce clause has been given no such narrow construction. The constitution

of the United States was not adopted to be enjoyed by any particular class or classes, but by all the people. The humblest citizen is as fully protected under that instrument as the greatest. All persons within the United States have the right to do interstate commerce free from the dictation of any state. The power to regulate that commerce, is, by the constitution, which is the supreme law of the land, vested exclusively in congress and any interference with the subject by the states is absolutely void.

We respectfully submit that the defendant in error has failed utterly to justify the decision of the court below in this case and that decision should be by this court reversed.

Respectfuly submitted,

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Attorneys for Plaintiff in Error.

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OFFICE SUPREME COURT
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JAMES H. McKENN

(19,801)

Supreme Court of the United States

OCTOBER TERM, 1906

NO. 47.

N. L. REARICK,

Plaintiff in Error.

VS.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

IN ERROR TO THE SUPERIOR COURT OF PENNSYLVANIA.

Brief and Argument for Defendant in Error.

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STATEMENT OF THE CASE.

Sunbury Borough has an Ordinance which provides *inter alia* "that it shall be unlawful for any person to sell at retail by sample or otherwise, or to solicit orders for, sell or *deliver at retail* either on the streets or by traveling from house to house * * * * any foreign or domestic goods, &c., without a license," and excepts from its operation manufacturers and producers selling their own products.

Kunkle, an agent of the Citizens' Wholesale Supply Company of Ohio, canvassed from house to house in Sunbury and took orders by sample for groceries, brooms, &c. These orders were transmitted to Ohio. There, groceries to fill each order were packed in separate boxes, each box being marked "N. L. Rearick for———" (the name of the person ordering the goods). Where a broom had been ordered, the person's name was written on the handle and then all the brooms that had been ordered for Sunbury tied together in the usual bunches of one dozen each and all marked "N. L. Rearick." All of these goods were placed in a railroad car and consigned to N. L. Rearick at Sunbury, (Rearick was the agent of the Ohio Company for delivering goods and receiving the money therefor) who alone had authority to receive the same from the Railroad Company at Sunbury and who alone was responsible to the Ohio Company for same. Rearick received the goods at Sunbury, delivered the several boxes by wagon to the persons whose names were marked thereon, cut the bundles of brooms and delivered by wagon each broom to the person whose name was written on the handle thereof, and received the money therefor. It was for Rearick's part in this transaction that he was arrested and convicted for a violation of the Sunbury Ordinance, which conviction was subsequently sustained by the Superior and Supreme Courts of Pennsylvania.

ARGUMENT.

The questions raised by the plaintiff in error we believe can be fully considered under the following general heads:

I.

Was the Plaintiff in Error at the time of delivering the goods in question, viz., groceries and brooms, engaged in inter state or infra state commerce? Under this head

A. Where did the sale take place?

B. Was delivery made to the consumer in the original package?

II.

*If Rearick, the Plaintiff in Error, at the time of delivering the goods was engaged in inter state commerce, is the Sunbury Ordinance in question an unconstitutional regulation of inter state commerce? That is, does it violate clause 3, section 8 of article 1 of the Federal Constitution, which provides "Congress shall have power * * * to regulate commerce with foreign nations and among the several states."*

A. Considered as a license tax.

B. Considered as a police regulation.

III.

Does the Sunbury Ordinance in question violate Section 1 of the Fourteenth Amendment to the Federal Constitution?

We shall consider these questions in the above order.

I.

WAS REARICK, THE PLAINTIFF IN ERROR, AT THE TIME OF DELIVERING THE GOODS, ENGAGED IN INTER-STATE OR INFRA-STATE COMMERCE? AND, UNDER THIS HEAD

A. Where did the sale take place?

Commonwealth vs. Hess, 148 Pa. 98, decides that where Hess, a licensed liquor dealer in Philadelphia, received orders by telegraph and by mail from residents of Montgomery county for liquors, and the goods were then set apart in Hess's warehouse for the several parties in Montgomery County and charged on the books of Hess to the several parties in Montgomery County, and then loaded upon the wagon of Hess and delivered from his warehouse to the several parties in Montgomery County and payment made therefor by the Montgomery County parties direct to Hess, either by mailing check or by going to the warehouse of Hess in Philadelphia and paying in person, that this was a sale in Philadelphia.

The particular points which we desire to call to the attention of the Court in this case are:

1. The orders for the liquor delivered were sent to Hess's place of business in Philadelphia from week to week in the usual course of business.

2. The driver of Hess's wagon *did not solicit* orders in Montgomery County.

3. That upon receipt of such orders the goods so ordered were set apart and *charged to the purchaser* upon the books of Hess; the sale in each instance being upon credit.

4. After the orders were received in the usual course of business (which it will be found upon an examination of the succeeding cases was either by mail or telegraph) and

the goods set apart to the respective purchasers and *charged upon the books* of Hess; they were then loaded upon the delivery wagon of Hess and by this wagon delivered to the respective purchasers at their place of business in Montgomery County, and in some instances were shipped by railroad to the purchaser.

5. *Bills were afterwards made out and sent direct to the several purchasers in Montgomery County who paid them either by check sent to Philadelphia or in cash paid in person at the place of business of Hess in Philadelphia, after delivery had been made in Montgomery County.*

In the case of Comth. vs. Holstine, 132 Pa. 357, in which case the opinion of the Supreme Court of Pennsylvania is delivered by the same Justice as in the case of Commonwealth vs. Hess, to wit, Chief Justice Paxton, the Court holds that where Holstine, who was the driver of the delivery wagon of Otto, a licensed bottler having a place of business in the city of Philadelphia, in the course of his regular employment of delivering bottled ale and beer to Otto's customers who had ordered it, was in the habit of taking orders in Montgomery County which he returned to his employer in Philadelphia who filled the orders, and the goods which were set apart to fill the orders were then loaded upon Otto's wagon and delivered in Montgomery County and the money collected therefor by Holstine and returned to his employer, that this transaction constituted a sale in Montgomery County, and that Holstine was therefore guilty of selling liquors in Montgomery County without a license.

The particular points to which we desire to call the Court's attention in this case are:

1. That the orders were solicited in Montgomery County by the agent or employee of Otto, the Philadelphia dealer,

and not sent in from Montgomery County by mail or telegraph in the usual course of business.

2. *That no credit was extended* to the several purchasers in Montgomery County by Otto ; *no charge made upon his books* for their respective purchase and *no bills sent by him* to the respective purchasers, but the goods were loaded upon his wagon and *delivered only upon receipt of cash* for same.

This last mentioned case is cited and commented upon in the opinion of the Supreme Court of Pennsylvania in the case of Commonwealth vs. Hess, *supra*, and distinguished from the case of Commonwealth vs. Hess.

Commonwealth vs. Garbracht, 96 Pa. 449, decides that where Garbracht, a traveling agent of a wholesale liquor dealer, resident in the city of Erie, took orders from residents of the county of Mercer and forwarded the orders to his principal in Erie by mail, who shipped the whiskey so ordered from his house at Erie to the several purchasers in Mercer county by freight or by express, and charged the same upon his books to the respective purchasers, and in some instances these bills were afterwards collected by Garbracht, the agent, that this constituted a sale in the city of Erie and that Garbracht was not guilty of selling without a license in Mercer county.

The particular points to which we desire to call the attention of the Court are :

1. That the orders for whiskey which Garbracht solicited in Mercer county and transmitted to his employer at his store in Erie were shipped by freight or express *consigned to the parties respectively* from whom the orders were obtained, *according to the usual course of business.*

2. That there was no evidence that Garbracht had any

whiskey in his possession in Mercer county, or that *he personally delivered any there.*

3. The evidence being that Garbracht delivered none of these goods himself, but that they were delivered by his principal to the common carrier consigned direct to the several purchasers, we must conclude that *credit was given* by Garbracht's principal to the several purchasers notwithstanding that in several instances he collected bills after the goods had been delivered by the common carrier.

4. That the Court states in its opinion "If there had been evidence to show that he (Garbracht) delivered any whiskey in the latter county or agreed to do so and his agreement was carried out by his principal, a different case would be presented." Garbracht was subsequently tried in the courts of Mercer county and evidence was introduced to show that he agreed to deliver the whiskey in Mercer county and actually did deliver it. He was convicted of selling liquor in Mercer county without a license. This case was appealed to the Supreme Court of Pennsylvania and affirmed and reported in 1 Pennypacker 471, showing, as will appear by a reference to the case last cited, that the delivery by Garbracht or by Garbracht's principals, even though it be in part by a common carrier, if it is done at the expense of the vendor, constitutes a sale at the residence of the vendee.

Commonwealth vs. Fleming, 130 Pa. 138, which is in exact accord with the C. O. D. cases cited by the plaintiff in error, recently decided by this Court, decides that where Joseph Fleming, a wholesale liquor dealer in the city of Pittsburg, caused by his employes and agents, to be advertised in certain papers in Mercer county, and also by handbills distributed at fairs and other public gatherings in Mercer county, that he would sell and deliver liquors C. O. D. in Mercer county to any one who might order by postal card

addressed to his store in Pittsburg, and that in pursuance of said advertisements numerous postal card orders were sent from Mercer county citizens to the place of business of Joseph Fleming in Pittsburgh, for liquors of various kinds, which were packed, marked with the name of the purchaser, C. O. D., and delivered to the Express Company, who transmitted the same to Mercer county and in turn delivered to the several purchasers and collected the money therefor and made settlement with Joseph Fleming, that in this case the sale took place in Pittsburgh and that Joseph Fleming consequently was not guilty of selling liquors without license in Mercer county.

The particular points in this case which we desire to call to the attention of the Court are :

1. That the orders were transmitted from Mercer County to Pittsburgh *by mail*, thereby placing the vendor and vendee in direct communication.

2. That the delivery to the Express Company, the common carrier, was a delivery to the vendee for the reason that the vendor had performed the *whole* of his contract, and for the further reason that they looked alone to the common carrier for the purchase money thereof.

From a careful consideration of these cases, which is the law of the land as well as of Pennsylvania, it will be noticed that goods delivered by the private conveyance of the vendor to the vendee constitute a sale at the place of business of the vendor, *provided that the goods be charged to the vendee on the books of the vendor, and credit extended by the vendor to the vendee.* That although the orders be solicited by the employe of the vendor, if goods, in pursuance of these orders, are shipped by a common carrier or by private conveyance of the vendor *direct to the vendee and*

credit extended to the vendee, that the sale takes place at the store of the vendor. That where the goods are ordered by the vendee from the vendor, to be shipped by express C. O. D., that the vendor has performed fully his part of the contract and completed the sale when the goods are delivered by him to the express company. Upon such delivery to the express company the sale, so far as the vendor is concerned, is complete and that thereafter the common carrier or express company alone is liable to the vendor, and that consequently the sale takes place at the point of delivery by the vendor to the express company, or usually at the residence of the vendor. But that where orders are solicited by the employees of the vendor and transmitted to the vendor at his place of business, and goods set apart to fill said orders, *without extending any credit to the vendee*, loaded upon the conveyance of the vendor and delivered by the employee of the vendor to the persons from whom orders were solicited, and *upon such delivery received payment therefor*, that the sale takes place at the house or residence of the vendee. This is decided in Com. vs. Holstine, supra., and commented upon in Com. vs. Hess, supra.

In the case at bar the orders were taken in pursuance of a house to house canvass. No credit was extended by the Citizens' Wholesale Supply Company to the several persons in Sunbury. Unlike the wholesaler who inquires carefully into the financial standing of the retailer before he marks his name upon a box for shipment, it made no difference to the Citizens' Wholesale Supply Company who the parties were whose names were placed upon the boxes and brooms. Their credit was extended only to Rearick. He alone was responsible for the value of the goods shipped, or the return of the goods themselves. He alone had authority to receive the same from the common carrier. There was no mutuality of contract between the Citizens' Wholesale Supply

Company and the purchaser in Sunbury. They were never brought together. True the order blanks show that the orders were given to the Citizens' Wholesale Supply Co., but the orders were never *accepted* by this Company, and, had the goods not been delivered, no action could be maintained against this Company for non-delivery. "[illegible]ds were to be up to a certain standard, but there was [illegible]ing in the contract to prevent the agent, or those whom he represented, from making a tender or fulfillment of the contract, by bringing goods of the standard required from any city in the State of Pennsylvania."

Having shown that the names of the purchasers marked upon the several boxes and brooms did not, and could not, mean that a sale was made in Ohio to a citizen of Sunbury, and that it was not the intention of the Ohio Company to transfer the title to the goods at the time the names were placed upon them; it must be concluded that these names were placed upon the boxes and brooms either as a device to bring the trade within the protection of the Inter-State Commerce Laws, or as a clerical act to assist the delivery agent; in neither of which cases could it constitute an element in Rearick's defense.

But further than this, in the case at bar the goods were sold by sample and subject to inspection by the vendees, and if not up to the standard of the sample they could refuse to accept. It was said in the case of Com. vs. Hess, *supra*, on page 109, the passing of the title upon a sale of chattels depends upon the intentions of the parties to be derived from the contract and its circumstances (supported by Gonsar vs. Smith, 115 Pa. 452).

Under all the circumstances as set out in the statement of facts, what was the intention of the parties? Was it the *intention* of the Citizens' Wholesale Supply Company that

title pass to the several purchasers in Sunbury when the goods were delivered at the railroad station at Columbus, Ohio, or when they were set apart at Columbus for delivery to Rearick, the plaintiff in error? If so, why did they consign them to Rearick? If so, why were they not charged to the several residents of Sunbury upon the books of the Citizens' Wholesale Supply Company in Columbus, Ohio? Does it not appear that under all the circumstances,—the consignment to themselves by the vendor, the instructions to deliver no goods except for cash, the privilege on the part of the vendee to inspect, the sending on of their own trusted delivery agent to assist in making the delivery rather than to entrust it to the local representative of Sunbury who took the orders,—that the intention of the Citizens' Wholesale Supply Company was beyond a doubt to control absolutely the property in question and title thereto until delivery at the house of the purchaser and the money received therefor? When these orders were taken there was no obligation on the part of the Citizens' Wholesale Supply Company to fill the order, and the residents of Sunbury had no action against the Citizens' Wholesale Supply Co. for the non-fulfilment of such order. In short, the vendee in Pennsylvania never entered into a contract with the vendor in Ohio. There was no contract between Rearick and the vendee to sell goods which were in the State of Ohio. He could have completed his contract by furnishing goods perchance from a Pennsylvania warehouse of the Citizens' Wholesale Supply Company, or, perchance, from any other source within the state.

We submit that the facts bear every test of a sale in Pennsylvania and none of a sale in Ohio; that the sale did not take place until the goods were delivered by Rearick at the residences of the several purchasers, and he, Rearick, received the money therefor, and that Rearick was therefore

selling goods at retail from house to house in Sunbury and was engaged solely in infra-state commerce, and, even though delivery was made in the original package, Rearick and his goods would, nevertheless, under the ruling of this Court in Woodruff vs. Parkham, infra, 75 U. S. 123, and Hinsen vs. Lott, 75 U. S. 148, and other cases hereafter cited, be subject to a general State tax.

B. Was delivery made to the consumer in the original package?

The most recent utterance of the United States Supreme Court on the original package question is contained in the case of Austin vs. Tenn., reported in 179 U. S. 343, &c. A careful perusal of the opinion in Austin vs. Tenn. with reference to the authorities there cited gives a clear interpretation of the legal meaning of an original package. From an examination of this case and the opinion of the Court below it will be seen that a package in the hands of the consumer, in order to be an original package within the meaning of the inter state commerce clause of the Constitution, must be in such shape, size and form as it was delivered by the importer to the common carrier in another state. It is to be adapted to meet the requirements of inter state commerce and not the requirements of an unlawful domestic retail trade.

In the case of May & Co. vs. New Orleans, 178 U. S. 496, the facts were as follows: May & Co. took orders for linens, towels, table cloths, &c., and sent the orders to Europe, together with orders for stock goods. They were imported in bales and boxes. The bales and boxes were broken but none of the manufacturer's packages within were broken.

This Court held that the outer package was the only original package and that the unbroken manufacturers' package, the moment it was separated from the larger bale or box, was subject to state taxation.

Using these definitions as tests, was the broom that was delivered, for instance, to John Doe in Sunbury, received by John Doe in the same size, shape and form of package as it was delivered by the Citizens' Wholesale Supply Co. to the Railroad Company in Columbus, Ohio? It will be remembered that the statement of facts discloses that brooms to fill each order were selected and marked and that they were then tied together in bundles of one dozen each, aggregating in this one dozen package, brooms for several or possibly one dozen persons. Within the decisions above, the original package was the one dozen package of brooms and not each separate broom. If it be construed that each separate broom be an original package then one dozen pasteboard packages of cigarettes tied in a single bundle with a cord or rope and delivered in such a bundle to the common carrier and delivered in turn by the common carrier to a dealer or agent of the consignee in another state, when the cord or rope is cut constitutes twelve separate original packages of cigarettes instead of one.

If then the single broom when delivered to the purchaser ceased to be an original package and was not delivered as such, and the sale of this broom took place when the delivery was made, as it certainly did under the decisions hereinbefore set forth, then Rearick, as the agent of the Citizens' Wholesale Suppy Co. was guilty of making sales from house to house in the Borough of Sunbury, of goods which had become mingled with the common mass of goods in the State of Pennsylvania and would therefore be guilty under the ordinance.

But it was contended by the defendant in the court below that the ruling in these cases do not apply to the case at bar for the reason that in the case at bar each box or broom was marked in Ohio with the purchaser's name. Could it be seriously contended that if in the Austin case, supra., the person to whom the cigarettes had been shipped had sent to the manufacturer in another state a long list of names with a request that he send him one small box of cigarettes for each person, and the manufacturer wrote on each of the small boxes one of the names contained on said list and then aggregated the numerous, small, so labelled,boxes in a basket and shipped them as in the Austin case, that he would be protected under the Inter-State Commerce rulings?

Again, in drawing a parallel between the case of May & Co. vs. New Orleans, *supra*, and the case at bar, what can be the difference, so far as the original package question is concerned, between a manufacturer's package of table cloths ordered by the importer for a specific person whose name is on his books, and a broom ordered for a specific person whose name is on the broom instead of the books? This Court has said that separating the bundle of table cloths from a larger mass of property, with which it was assembled for shipment, was breaking the original package, and that the table cloths thereby became part of the property of the State and subject to its taxation. If this be true, certainly the breaking of a bunch of brooms and separating one broom therefrom causes that broom to become part of the property of the State, and subject to its taxation. When we consider that in the May & Co. case, *supra*, the goods were imports from a foreign country, State taxation of which is absolutely prohibited, and that in the case at bar State taxation is disallowed only when such taxation in effect becomes a regulation of inter state commerce, the parallel becomes all the stronger in our favor.

Rearick was then, at the time of his arrest, selling or delivering from house to house in the borough of Sunbury, brooms which were part of the property of the State, and therefore engaged in infra-state commerce and subject to State regulation.

The foregoing reasoning and conclusion is not in conflict with Brennan vs. Titusville, 153 U. S. 289. It will be noticed from a careful examination of this case that Brennan took orders in the city of Titusville for certain goods, transmitted these orders to his principal in the city of Chicago, and that the goods were shipped direct from the principal to the parties in Titusville who gave the orders, thereby constituting a sale in the city of Chicago, State of Illinois, and not in the city of Titusville and State of Pennsylvania ; in other words credit was given by the principals of Brennan to the several purchasers in Titusville. That this is the fact and that these are the reasons for the decision of the United States Supreme Court, as above stated, is not only made plain in the opinion of the Court, but is commented upon by this Court in the case of Emert vs. Missouri, 156 U. S. 296, in which this Court says, "In Brennan's case it was expressly agreed by the parties that the goods ordered by him for sale in the State of Pennsylvania were afterwards sent by their owner in another State *directly* to the purchasers," showing conclusively that the fact that they were so sent directly, the credit was extended by the citizen of Chicago to the citizen of Pennsylvania, thereby bringing the vendor in one State in communication with a vendee in another, was what prompted this Court in its decision. In short, the principle decided in this case is that where an agent comes from one State into another and there takes an order for goods and transmits it to his principal in the first State, who *accepts* the same, fills it, extends credit to the

buyer and ships the goods direct to the buyer, he is engaged in inter-state commerce.

Another elemeut that is to be taken into consideration in this case that distinguishes it from the case at bar is, that the goods for which orders were taken by Brennan were specially manufactured for each particular customer. Brennan was the agent of a manufacturer and the fact that they were specially so manufactured proves conclusively that it was necessary to bring the vendor in one State in direct communication with the vendee in another. There is another element in this case which would warrant the decision of the Supreme Court in finding it unconstitutional, and which element is not found in the case at bar ; that is, the proviso in the Titusville ordinance reads, "provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing and doing business in said city." Had this proviso had inserted in it, that it should not apply to persons selling to manufacturers or merchants at their place of business there might have been some merit in the classification; but, under the ordinance as it stands, it was possible foi one to solicit orders at the residence of a merchant or manufacturer without a liceuse and not solicit at the residence of the merchant's neighbor who happened to be a lawyer or laborer. Mr. Justice Brewer in speaking for the Court in this case, at the beginning of his opinion, lays stress upon the fact that the question in the Titusville case is whether a *manufacturer* of goods who carries on his business of *manufacturing* in one state can send an agent into another state to solicit orders for the products of his manufactory, without paying to the latter state a tax for the privilege of thus trying to sell his goods.

Neither does the case of Robbins vs. Shelby Taxing District, 120 U. S. 489, cited by the plaintiff in error, apply to

the facts of this case. Robbins was solictiting orders from mercantile houses as a commercial drummer; the goods were shipped direct from his principal to the commercial house, and credit extended to the commercial house. The fact that he was a commercial drummer separates him distinctly from a canvasser. This last statement is amply supported by the language of the Supreme Court of Pennsylvania, in which it says, "There is a very clear distinction between the traveling salesman or drummer acting as the intermediary between the importer or wholesale dealer, and the local trade; and the itinerant canvasser who goes from house to house, intruding himself into the homes of his prospective customers." This statute also contains the fatal geographical discriminating feature, the language of the act being, "All drummers and all persons *not having a regular licensed house of business in the taxing district.*" It will therefore be seen that persons having a place of business within the district are exempt as against those residing without the district. This in itself would warrant the conclusion of the Court. It will also be noted that this case does not have within it the element of house to house solicitation.

In the case of Caldwell vs. North Carolina, 187 U. S. 622, cited by plaintiff in error, the defendant was soliciting orders for portraits and picture frames. Portraits are goods or commodities which necessarily must be made to order. In short, the goods in question involved in the case of Caldwell vs. North Carolina were goods of the defendant's own manufacture, or of his principal's manufacture, and would therefore be exempt from local taxation or regulation under the ruling in Americal Sugar Refining Company vs. State of Louisiana, *supra.*

A careful examination of the facts found by the special verdict in this case discloses that the defendant was delivering pictures and frames for which *contracts of sale* had pre-

viously been made. This implies on its face that there had been a meeting of the minds of the parties, a mutual agreement on the part of one to buy and on the part of the other to sell. In other words, in order that there be a contract of sale it was necessary that the order given in one State be accepted by the principal in another. This would be bringing vendor and vendee together across State lines, and extending credit by the vendor to the vendee. These facts alone distinguish this case from the case at bar, there being nothing in the case at bar to show that the orders taken for goods subsequently delivered had ever been accepted by the Citizens' Wholesale Supply Company of Columbus, Ohio. In the Caldwell case the fact that the orders were so accepted, thereby constituting a contract of sale, evidently was a ruling element in the case, especially in the light of the decision of this Court in Brennan vs. Titusville, *supra*, as commented upon in Emert vs. Missouri, *supra*. We have a right then to assume that the principals of Caldwell in Chicago, Illinois, when they received from Caldwell the orders that he had taken in North Carolina, then and there extended credit to such purchasers in North Carolina and charged such purchasers with the goods in the State of Illinois.

Taking into consideration in the North Carolina case the peculiar nature of the goods sold, to wit, portraits, that when once made they would be of no value to anyone except the party for whom expressly made, are we not warranted in concluding that the vendors or manufacturers in Illinois inquired carefully into the financial standing of the vendees in North Carolina before entering upon the fulfillment of these orders, and then extended credit to them, and if credit were so extended then the sale took place in the State of Illinois, and the case is distinguished thereby from the one at bar.

This ordinance provides that "every person engaged in the

business of selling picture frames, &c. * * * unless the said business is carried on by some person in connection with some other business for which a license has already been paid to the city, shall pay a license tax, &c." It will therefore be seen that the outsider was compelled to pay the license tax while a person who was engaged in some other business and had already paid a license tax as a merchant or trader was exempt. In short, this ordinance contained the fatal geographical discriminating clause, which in itself would warrant the decision of the Court in the Caldwell case and distinguishes it from the case at bar.

We submit then that these three cases are not in conflict with the foregoing argument and that there is nothing in their rulings as applied to the facts of the case at bar that would warrant a reversal of the judgment in this case.

II.

IF REARICK THE PLAINTIFF IN ERROR, AT THE TIME OF DELIVERING THE GOODS WAS ENGAGED IN INTER-STATE COMMERCE, IS THE SUNBURY ORDINANCE IN QUESTION AN UNCONSTITUTIONAL REGULATION OF INTER-STATE COMMERCE? THAT IS DOES IT VIOLATE CLAUSE 3, SECTION 8, OF ARTICLE I OF THE FEDERAL CONSTITUTION WHICH PROVIDES "CONGRESS SHALL HAVE POWER * * * TO REGULATE COMMERCE WITH FOREIGN NATIONS AND AMONG THE SEVERAL STATES * * * ."

A. Considered as a license tax.

In entering upon a discussion of this question let it be remembered at the outset that the commerce clause of the Federal Constitution (Article I Section 8) deals with no

positive and absolute inhibition against the exercising of the local taxing power. A state tax levied upon a person dealing in goods brought from another state or upon the goods themselves, is not prohibited by the commerce clause of the Federal Constitution, neither is it ipso facto in violation thereof. Such a tax violates Article I Section 8, of the Constitution only when its enforcement so operates upon inter-state commerce as to amount to a regulation thereof. American Steel Wire Co. vs. Speed, 192 U. S. 518. Neither is the levying of every tax which remotely and indirectly affects inter-state commerce a regulation thereof in the constitutional sense. American Steel Wire Co. vs. Speed, supra.

It has been held by this Court that where a resident of one state ships goods into another state to its agent, and the agent subsequently hauls the goods through the country and sells them for the account of his principal in another state that he, the agent, and the property are amenable to the tax laws of the state and neither the agent nor the property is exempt from state taxation by virtue of the inter-state commerce clause of the Constitution, Emert vs. Missouri. 156 U. S. 296.

It has been held by this Court that coal shipped from Pennsylvania by a Pennsylvania firm to their agent in Louisiana to be sold by the agent for the account of the shipper and actually was so sold, and was sold in many instances upon the original barges before the same was unloaded, and in some instances sold before arrival; that the coal in the hands of the agent is the subject of state taxation and that the agent is amenable as a dealer to the state taxing power. Brown vs. Houstin, 114 U. S. 622.

It has been held by this Court that when a resident of one state ships whiskey to the resident of another state to be sold by the latter for the account of the shipper, that the whiskey is subject to local taxation and that such taxation is not a

regulation of or unconstitutional interference with inter-state commerce. Hinson vs. Lott, 75 U. S. 148.

It has been held by this Court that a city ordinance authorizing the collection of a tax on sales at auction is valid as applicable to goods which are products of other states, sold in original packages, and that it is not a constitutional regulation of inter-state commerce. Woodruff vs. Parkham, 75 U. S. 123.

It has been held by this Court that where a manufacturing firm in one state sent a representative into other states to take orders for goods that were then in the first state at the factory or not yet manufactured and the goods to fill these orders, viz. nails in kegs, wire in bundles, &c. were subsequently brought into the state where the sales were made, and stored in a warehouse awaiting shipping orders from the purchasers and the goods were delivered in the original shipping packages to the parties who had previously ordered them and charged upon the books of the manufacturing firm in another state; that a state tax upon these goods without discrimination was valid and not a regulation of inter-state commerce. American Steel & Wire Co. vs. Speed, 192 U. S. 518

As it then becomes necessary to ascertain what is meant by "regulating commerce" within the constitutional sense, inquiry should be made into the reason for vesting this power in Congress. Prior to the adoption of the Federal Constitution there existed in every State a jealousy bred of ambition to prosper, at the expense of its sister State. The purpose of the commerce clause of the Constitution was to limit the power of the State to enact discriminating legislation against the products and citizens of its sister State. Says Mr. Justice Field, in Weton vs. Missouri, 91 U. S. 275, speaking of the power to regulate inter-state commerce, "That power was vested in congress to insure uniformity of

commercial regulation against discriminating State legislation. It covers property which is transported as an article of commerce from foreign countries or among the States from hostile or interfering State legislation until it has mingled with and become part of the general property of the country." The ruling factor, therefore, in order to ascertain whether State enactments come within the constitutional meaning of "regulating commerce," is, do they discriminate either in express terms or by implication in favor of the property or citizens of their own State? This, under Mr. Justice Field's ruling, *supra*, is the very essence of determining whether or not a statute constitutes a State regulation; otherwise, if there were no such discrimination, why would it be necessary to protect the property "from hostile or interfering State legislation until it became part of the general property of the country" or State. This Court says, in Woodruff vs. Parham, 75 U. S. 123, "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the act is not, therefore, an attempt to fetter commerce among the States or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama." Again, in Hinson vs. Lott, 75 U. S. 148, this Court says, "The act institutes no legislation which discriminates against the products of sister States but merely subjects them to the same rate of taxation which similar articles pay that a remanufactured within the State. We do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States."

We might continue to cite authorities and quote from the

opinion of this Court, but it is sufficient to say that every state or municipal enactment, from Robbins vs. Shelby Taxing District down to Caldwell vs. North Carolina, that has been held by this Court to be a "regulation of commerce" within the constitutional sense, has discriminated directly or by implication against the citizens or products of other states. The logic of this reasoning and of this distinction is apparent when we remember that the object delegating the power of regulating commerce to Congress, was to protect the subjects of inter-state commerce from interfering state regulation. Protect for how long? Until they become part of the State property. Why? Because then they would be protected as all other State property, taxed as all other property, and classed with all other State property. How then could a state or municipal statute which treats the the subjects of inter-state commerce from the very beginning as all other like property is treated under like circumstances be held to be a regulation of such commerce.

It will therefore be seen that a State is not prohibited by the Federal Constitution from levying taxes upon goods which are the subject of inter-state commerce or upon persons engaged therein, and that taxes which indirectly affect inter-state commerce are not necessarily a regulation thereof, within the constitutional prohibition. The question therefore is not whether the Sunbury ordinance levied a tax upon goods which were the subject of inter-state commerce, or upon a person engaged in inter-state commerce, but whether the *enforcement* of such tax constitutes a *regulation* of inter-state commerce.

In the case of the American Steel Wire Co. vs. Speed, *supra*, the representatives of the American Steel Wire Co. journeyed from Chicago to Tennessee and took orders in Tennessee for the products of the American Steel Wire Company, which products were either then in a State other than

the one in which the orders were taken or were not yet manufactured. After a large number of orders were taken, the goods to fill these orders were shipped into the home State of the vendee and placed on storage for convenience of distribution and were subsequently distributed by the agents of the vendors to suit the convenience of the vendees, were charged upon the books of the vendors in the State of Illinois and credit extended to the vendee who resided in the State of Tennessee. These goods were delivered in their original shipping packages, and this Court held that the levying of a local tax upon the goods while awaiting delivery was not a regulation of inter-state commerce, and the same principle was decided in the cases heretofore cited.

Applying the facts of the case at bar, they are stronger than those of the case last above recited, for the reason that no credit was extended by the vendor in Columbus, Ohio, to the vendee in Sunbury, Pa., and for the further reason that the goods of the American Steel Wire Company were delivered to the vendee in unbroken packages and in the case at bar the packages of brooms were broken. Certainly there can be no difference between filing a number of orders for goods in an office in Chicago and sending sufficient goods to fill all of the orders to a warehouse in Memphis, and subsequently sorting them out, without breaking any packages, and delivering them to the several vendees as per order, as was done in the American Steel Wire Company case, and taking the orders in Columbus, Ohio, and marking on the several boxes the name of the vendee merely to facilitate delivery, and then sending them to Pennsylvania for delivery, which was subsequently made.

If the Sunbury ordinance is a regulation of inter-state commerce certainly the taxing provisions in the American Steel Wire Company case are also such a regulation, and if these taxing provisions of the American Steel Wire Com-

pany case are not a regulation of inter-state commerce, certainly the Sunbury ordinance cannot be.

This same parallel might be drawn between the case at bar and the case of Brown vs. Huston, *supra*, and Hinson vs. Lott, *supra*, and Woodruff vs. Parker, *supra*, with the same results.

B. Considered as a police regulation.

(a) The state, by virtue of its police power and its jurisdiction over persons and property within its limits, has the right to provide for the security of the lives, limbs, health and comfort of persons and for the protection of property. Leisy vs. Harden, 135 U. S. 109.

(b) The state, by virtue of its police power and its jurisdiction over persons and property within its limits, has the right to adopt precautionary measures against social evils and the enactment of such laws as have immediate connection with the protection of persons and property against the noxious acts of others. Railroad Co. vs. Husen, 95 U. S. 465.

(c) The police power has been held to justify the state in the adoption of legislation to prevent the spread of crime. Plumley vs. Mass., 155 U. S. 478.

The Borough Ordinance in question does not pretend to prevent the selling of commodities within the borough limits even though they be imported from outside, but it does pretend to regulate the manner by which a certain kind of selling can be done and by whom it can be done. If it is within the police power of a state to enact such laws as have immediate connection with the protection of persons and property against noxious acts, as was held in Rail-

road Co. vs. Husen, *supra*, and to enact laws to prevent the spread of crime, as was held in Plumley vs. Mass., *supra*., then, certainly, it is within the same power to enact laws to prevent, or at least regulate the "domiciliary visitations of itinerant peddlers and canvassers who assail the privacy of domestic life and who have mostly to deal with innocent and unsuspecting women and children, defrauding them of money and property and then fleeing to other states, leaving their victims without redress." Many peddlers of and canvassers for the sale of books, teas and other articles are honest and estimable people, but it is a business in which the vagrant, dishonest and violent, may readily engage, and in order to meet the legal requirements of classification the good must suffer with the bad. Its successful pursuit almost necessarily involves an intrusion into the private dwellings of citizens, with the incidental opportunities for theft and to observe the means of access for those intent upon future burglary. In order to, in some measure, guard against these evils and to protect families against incessant annoyance it is within the police power of a borough, for the promotion of good order, to identify those engaged in such business by requiring a license.

In the case at bar the defendant was delivering, among other things, groceries. Can it with reason be contended that the enactment of a law or ordinance which has in view the restriction of intrusive house to house solicitation, or the restriction of the opportunity to impose inferior goods and commodities upon the householder, or the restriction of opportunities for theft or burglary, is not a legitimate exercise of the police power of the state or city?

This Court has held in Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, the exaction of a license fee is an ordinary exercise of a police power by municipal corporations aad the act by which the exaction is authorized from a ferry

plying between two states will not be held to be a regulation of commerce. In Howe Machine Co. vs. Gage, 100 U. S. 676, this Court held a state tax on peddlers of sewing machines which applies alike to machines manufactured in the state and out of the state is valid, and not repugnant to the United States Constitution. In this case the Court said, "In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the state or of the citizens of the state which enacted the law. Where there is such discrimination it is fatal. Other considerations may lead to the same result." The question that was before the Court, was whether or not such a tax upon peddlers was a regulation of inter-state commerce within the constitutional meaning.

It has been held in Emert vs. Missouri, 156 U. S. 296, that a license tax upon peddlers of sewing machines was a proper police regulation. In this case the sewing machines were brought from another state and placed upon a wagon in their original packages and taken through the country and offered for sale, and actually sold. It has been held by this Court that where a peddler comes from another state and brings goods with him and travels through the second state and offers the goods which he carries with him, for sale, that he is a subject of police regulation, even though he expects to return to the first state.

In the case of Emert vs. Mo., Mr. Justice Gray speaking, for the Court, said, "The statute in question is not part of a revenue law, it makes no discrimination between residents or products of Missouri and those of other states, and manifests no intention to interfere in any way with inter-state commerce. Its object in requiring peddlers to take out and pay for a license, and to exhibit their license on demand to any peace officer or to any citizen householder of the commonwealth, appears to have been to protect the citizens of the

state against the cheats and frauds or even thefts which, as the experience of ages has shown, are likely to attend the itinerant and irresponsible peddling from place to place and from door to door." The evil aimed at, as pointed out by the Court, is the house to house visitation. If such house to house visitation by persons carrying goods with them is the subject of proper police regulation, certainly the business of taking orders from house to house one day and sending them across the state line or perchance carrying them across the state line, and delivering the goods the next day, is equally liable to such police regulation. If this be not so, then the itinerant peddler has but to leave his pack upon the border line of the state, pass over the border line, solicit orders from door to door and carry them across the border line, select from his pack goods to fill them, recross the border line and carry them to the places where they were ordered, and he will evade the state police regulation. The large vendor of wholesale merchandise who desires to sell his wares in Pennsylvania, without complying with its laws, need but locate his warehouse in Camden, N. J., and send his canvassers from house to house in Philadelphia, and neighboring towns, and when asked to take out a license or pay a license tax, then invoke the protection of the inter-state commerce clause of the Federal Constitution. If it is a proper police regulation to license the man who brings the goods from another state and leaves them in a warehouse and then solicits from door to door for the purpose of selling them; if it is a proper police regulation to license a person who brings goods with him from another state and seeks customers therefor from house to house, both of which questions have been ruled in the affirmative by this Court, why is it not a proper police regulation to license one who seeks his customers, then procures the goods from another State and delivers them from house to house? None of these laws are aimed at a regulation of inter-state com-

merce ; none place a burden upon inter-state commerce ; all are dealers, all are canvassers and all are alike taxed or licensed, whether residents or non-residents of the State.

Such remote connection with inter-state commerce was never intended as a passport to evade the laws of a State, and clause 3, section 8 of article 1 of the Federal Constitution was never intended by its great framers as a refuge for itinerant peddlers, house-to-house traders, book agents, map canvassers, and grocery solicitors, when called upon to answer the police and license tax laws of a State.

In Pennsylvania we have a statute making it unlawful to carry on any worldly employment on Sunday. Suppose the goods in question in the so called original packages had been delivered on Sunday, would it be seriously contended that the person delivering the goods and receiving the money therefor was not guilty of a violation of our Sunday laws simply because the goods came from another State and were yet in their so called original packages? This Court has decided that such a law, because it incidentally interfered with inter-state commerce, was not a regulation thereof within the Constitutional meaning.

Suppose Rearick had used an automobile to deliver the goods in question, would it be seriously contended that he was exempt from a Pennsylvania automobile license because he was delivering goods from another State? Carry the illustration a step further and suppose that Rearick had brought the goods from Ohio in an automobile, would it be seriously contended that he would be exempt from a Pennsylvania automobile license as he entered the State because he was carrying goods from another State? As well might it be contended that he would be for the same reason exempt from paying toll upon a piked road.

Prior to recent Congressional action one State could not prevent the introduction and sale of intoxicating liquors

brought from another State, yet it could prohibit the sale of such liquors to minors, habitual drunkards, &c., notwithstanding it was delivered to them in the original package. Commonwealth vs. Zelt, 138 Pa. 615. Why? Because a regulation of sales to this particular class was not a regulation of commerce. Ergo a regulation of sales from house to house is not a regulation of commerce.

Inter-state commerce refers to a free interchange of commodities between citizens of the different States, without regard to State lines. If this be correct then the laws relating to soliciting and delivering from house to house do not interfere with or regulate such interchange, and cannot be an invasion of the authority of the United States. They erect no barriers at the State line, provide for no inspection or stoppage, and levy no tax on the introduction into or transportation through the State of any sort of property whatever. The citizen of another State may come into Pennsylvania when he will and where he will, stay as long as he chooses, open as many places for the sale of his goods as he may see fit, and enjoy the same measure of freedom in regard to the conduct of his business as a native citizen. But when he comes within the State permanently or temporarily, he is under the protection of its laws, and the correlative duty of obedience rests on him. His rights are equal to, but not above, those of the citizen. He has no more right to sell intoxicating drinks without a license than a citizen; no more right to sell cigarettes to children, or oleomargarine to customers. No more right to run an automobile without a license because he is engaged in delivering goods across State lines than a citizen. He has no better right to solicit or deliver from house to house than a citizen. Otherwise would render the possession of the police power useless to the State. If it is true, as now contended, that the itinerant stranger who haunts the mining and manufacturing towns

of Pennsylvania, and possibly other States, in a manner scarcely conceivable by one not familiar with these districts, intruding himself upon the privacy of domestic life by his domiciliary visitation, often imposing upon the credulous housewife goods for which she has no need and can ill afford ; if it is true that such person is the ward of the Federal Constitution engaged in inter-state commerce with the power of the government of the United States interposed between him and the police power of the State, certainly we have stumbled on a startling and unlooked for result of the investment of the general government with the power to regulate commerce. But are not these matters of *local* interest? They are not national in their character like railroads, post roads, stage coach companies, steamboats, &c., such as the framers of the Federal Constitution evidently had in mind, and so long as these local laws do not discriminate in favor of the property or citizens of the State enacting such local laws, they do not and cannot, we submit, regulate commerce within the Constitutional meaning thereof.

III.

DOES THE SUNBURY ORDINANCE IN QUESTION VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IN THAT IT DISCRIMINATES IN FAVOR OF PRODUCERS, &C.?

In the case of American Sugar Refining Co. vs. State of Louisana, 179 U. S. 89, this same question was before this Court upon the following facts. The State of Louisana imposed a license tax upon all persons, &c., engaged in the business of refining sugar and molasses, and exempted from the operation of said statute, "planters and farmers grinding

and refining their own sugar and molasses," that is grinding and refining the sugar and molasses raised or produced by themselves.

The defense set up was that the act was in violation of the Fourteenth Amendment of the Federal Constitution in that it discriminated in favor of a certain class of refiners.

It will be noted that the facts of the case at bar, so far as the discriminating phase goes, are identical with the facts of the case above quoted, and we can advance no better argument in defense of our position, that the proviso in the Sunbury ordinance discriminating in favor of producers, does not thereby violate the Federal Constitution, than quoting from the opinion of this Court in American Sugar Refining Co. vs. State of Louisana, *supra*, in which Mr. Justice Brown, delivering the opinion of the Court, said, "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid."

Of course, if such discrimination were purely arbitrary, oppressive or capricious and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as tax payers, such exemption would be pure favoritism and a denial of the equal protection of the laws and the law's favor, but from time out of mind it has been the policy of this government not only to classify for purposes of taxation *but to exempt producers from the taxation of the method employed by them to put their products upon the market* (the italics are Counsel's). The right to sell is clearly an incident to the right to manufacture or produce and it is at least a question for the Legislature to determine whether anything tending to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production.

Again, this Court says in the same case, "The Internal Revenue Act exempts distillers who sell the products of their own stills from a tax as wholesale dealers in liquors. While no question of the power of Congress is involved this, with other instances, shows that its general policy does not differ from that of the Act in question, and that the discrimination is based upon reasonable grounds."

The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations and those who engage in a general refining business and refine sugar produced by themselves or put in their hands by others, &c. * * * * The discrimination does not deny to persons and corporations engaged in general refining business the "equal protection of the laws."

In the court below Rearick strenuously contended that the Sunbury ordinance was a tax and not a police regulation, and Brennan vs. Titusville, 153 U. S. 289, was cited as an authority that all municipal licenses were taxes. Now, in order to avoid the ruling of American Sugar Refining Co. vs. State of Louisiana, *supra*, it is contended by Rearick, in his argument to this Court, that the Sunbury ordinance is not a tax and therefore the classification between dealer and producer, between trader and manufacturer, which is held by this Court to be valid (American Sugar Refining Co. vs. State of Loisiana) is not applicable to the case at bar. Certainly, whatever else the Sunbury ordinance may be, it is, under all the rulings of this Court, a license tax ; and if it happens, incidentally, to be a police regulation, it does not thereby lose its character as a license tax. And, even though it be a police regulation distinctively and exclusively, its classification is not in violation of the Fourteenth Amendment. The case of Connolly vs. Union Sewer Pipe Co., 184 U. S. 559, relied upon by plaintiff in error, does not apply. The act referred to in that case prohibited combina-

tions of capital &c. and to it was added a proviso that the act should not apply to agricultural products or live stock while in the hands of the producer or raiser. The evil aimed at in this act was the "combination of capital," and it could not be contended that the combination of capital among the producers of agricultural products as to those particular agricultural products was a *necessary incident to their production* and therefore to contend that people engaged in one line of business could lawfully make combinations of capital while those engaged in another line of busi- could not, would certainly be an unlawful discrimination.

In the Connolly Case, *supra*, the statute of Illinois did not provide for granting a license to do certain things, but imposed *an absolute prohibition* upon one class to form combinations and in effect granted open liberty to another class to do the thing prohibited, the prohibited thing not being necessarily germane to the business of the second class. It must be remembered there is a difference between *absolute prohibition* and *licensing*, and an equal difference in the authority to impose the same.

Mr. Justice Harland in delivering the opinion of this Court in Connolly vs. Union Sewer Pipe Co., *supra*, after referring to the case of the American Sugar Refining Co. vs. The State of Louisiana, *supra*, says, "The decision now rendered is not at all in conflict with with the views expressed in the two cases just cited (American Sugar Refining Co. vs State of Louisiana being one of them). It is sufficient to say that these cases had reference to the taxing power of the state and involved considerations that could not in the nature of things apply to state enactments like the one involved in the present case. The power to tax persons and property is an incident of sovereignty and the extent to which it may be exerted has been indicated in numerous cases. * * * A tax may be imposed only upon certain callings and trades, for

when a state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes.* * * A state may in its wisdom classify property for purposes of taxation and the exercise of its discretion is not to be questioned in a Court of the United States so long as the classification does not invade the rights secured by the Constitution.

For instance, this Court has held that it is within the power of a state to impose a license upon an auctioneer engaged solely in selling imports in original packages, and it has held, on the other hand, in Leisy vs. Hardy, 135 U. S. 100, and Lyng vs. Michigan, 135 U. S. 161, (Explained in American Steel Wire Co. vs. Speed, 192 U. S. 518,) that a state had no authority to *absolutely prohibit* the sale of goods coming in from another state, thereby drawing the distinction between *prohibition* on the one hand and *license* or taxation on the other.

As was said by this Court in Diamond Glue Co. vs. United States Glue Co., 187 U. S. 611, where a state provided that foreign corporation doing business within its borders must first deposit a copy of its charter and deposit a fee. "The prohibition in this case is not absolute but is only conditional on the failure to deposit a copy of the plaintiff's charter and to pay a small fee * * * it can be avoided by compliance with the regulation."

Under a prohibitory enactment no one, under any circumstances, can do the thing prohibited. Under a license enactment all have an equal opportunity to obtain the license. To illustrate, the laws of Pennsylvania provide that the person who desires to sell intoxicating liquors must first obtain a license and, after the license is obtained, he is at liberty to engage in this business. His neighbor who undertakes the sale of intoxicating liquors without a license is liable to a penalty. Yet it has never been contended that he is denied

the equal protection of the laws because he cannot do what his neighbor across the street does with perfect freedom. And the reason is simple : The two men have equal opportunities to obtain the license, providing their personal qualifications be equal ; the one obtains it, the other does not ; they are equal before the law, and, while the business conducted by the one who has the license may be as detrimental to the community as if it were conducted by the one without a license, yet, nevertheless, the distinction is legally made. If, however, all persons within a given community were absolutely prohibited from selling intoxicating liquors, with no provision for a license or otherwise, except one certain class who might be engaged in some particular business or reside upon some particular street, this would be arbitrary discrimination, because the first class would not have the equal opportunity with the second, and it would be denying them the equal protection of the law.

An Act of Assembly of the State of Pennsylvania provides that any one desiring to practice the profession of medicine must first obtain a license therefor, and makes it a penal offence for any one undertaking to practice medicine without first obtaining a license ; so that one man can be thrust into prison for doing that which his neighbor does with perfect freedom. Yet both of these persons are given the equal protection of the law for the reason that they both have the opportunity, so far as the law is concerned, to become licensed practitioners of medicine. If, however, all persons were absolutely forbidden to practice medicine except those engaged in the manufacture of drugs, then the case would come within Connolly vs. Union Sewer Pipe Co., *supra.*

Again, many states have provided that an automobile or the driver thereof, must be licensed and provides a penalty for any one operating an automobile without a license. A., with a license, operates his machine with perfect freedom

under the protection of the laws; B., without a license, is thrown into prison for doing what A. is permitted to do; yet it has never been seriously contended that B. has been denied the equal protection of the laws under the Fourteenth Amendment. The reason is apparent: B. is not denied the privilege of operating his automobile, but is only disallowed from operating it without complying with certain conditions, which conditions are entirely within his reach, and he is given the same opportunity to obtain the license as his neighbor A. Yet, if all persons were absolutely prohibited from operating automobiles with a proviso that the prohibition should not apply to those engaged in the manufacture of them, this could with some reason be considered arbitrary discrimination and would be analogous to the case of Connolly vs. Union Sewer Pipe Co., *supra*.

If, then, soliciting orders and delivering goods from house to house had been *prohibited* by the Sunbury ordinance the ruling of Connolly vs. Union Sewer Pipe Co., *supra*, might apply, but as the ordinance provides for a license tax and not a prohibition it must come within the ruling of American Sugar Refining Co. vs. Louisiana, *supra*.

The discrimination complained of is that retailers are placed in one class and wholesalers in another. True, this is a discrimination, but discrimination is the very foundation of all classification. If there were no discrimination, there could be no classification. It is therefore not discrimination that causes a statute to violate the Constitution but *arbitrary* discrimination, discrimination foreign to the subject matter. Certainly retailers in one class and wholesalers in another is both reasonable as well as germane to the subject. In the one class the person who sells to the consumer, in the other the person who sells to the merchant to sell again. In the one class the itinerant canvasser who makes his domiciliary visitation and assails the privacy of domestic life and who

has mostly to deal with innocent and unsuspecting women and children. In the other the commercial drummer who calls upon the man of business at his place of business and takes his order for goods to replenish the merchant's stock, which goods are shipped direct to the merchant. Quoting from the Supreme Court of Pennsylvania, "There is a very clear distinction between the traveling salesman, or drummer, acting as the intermediary between the importer or wholesale dealer and the local trade ; and the itinerant canvasser who goes from house to house intruding himself into the homes of his prospective customers."

We submit that this classification is founded upon a reasonable distinction and that all persons of the same class are treated alike under the same circumstances. The other classification, viz, "Any person who sells goods and wares, &c., not of their own manufacture," in short, dealers in the one class and manufacturers and producers in the other is equally as distinctive. True, the dealer is required to have a license to do that which the manufacturer can do without a license, but when the manufacturer sells he sells not as a dealer, not as one who buys to sell again, but purely as an incident to his real business of manufacturing.

The classifications of the ordinance are reasonable and germane to the subject, and treats persons in the same class alike, under the same circumstances, and therefore does not deny to any one the equal protection of the law. It does not provide, as contended by plaintiff in error, that a manufacturer can send his representative into Sunbury and canvass from house to house without a license, but it provides that "all who sell or deliver goods, &c., not of their own manufacture," that is, the manufacturer may himself canvass without a license for goods he makes himself, but he cannot send his agent to canvass because the agent would not be "selling or delivering" goods of *his own* manufacture but

goods manufactured by his principal. Neither does it discriminate in favor of the dealer, as contended by the plaintiff in error. Persons who sell to the merchant at his residence or place of business at *retail* are subject to the same license tax as persons who sell to the laborer or lawyer. The only question that might arise is what quantity of goods constitutes "selling at retail" or "delivering at retail." As to the case at bar that question is adjudicated. The Court below found upon the agreed statement of facts that the plaintiff in error was "delivering at retail" and that finding cannot be question here.

The local grocer who desires to solicit from house to house or to deliver goods from house to house, as the plaintiff in error was doing, is required to pay the same license as that exacted from plaintiff in error. Under no construction of the ordinance can it be considered to carry with it a geographical discrimination.

If, then, the Sunbury ordinance is a police regulation, as plaintiff in error contends, and its object is to regulate house to house solicitation, we submit that its classification is within theruling of every decision of this Court. It doubtless has been and is the experience of the legislative body that practically no one solicits at *wholesale* from house to house and that few, if any, *manufacturers* travel from house to house with their own goods. This leaves the producer as the only exempt class. In short, the farmer with his market truck, his house to house visitation is regulated by other legislation, viz, by a market ordinance permitting him to make such visitations only on certain days and hours. To adapt the language of this Court in Otis & Gassman vs. Parker, 187 U. S. 606, the evil sought to be stopped was confined in the main to the dealer who sold at retail from house to house and therefore legislation providing for the licensing of such dealers would practically meet the objects of the legis-

lative body. In the case of Otis & Gassman vs. Parker, last above cited, the State of California provided that all contracts for the sale of corporate stock on margins should be avoided. The constitutionality of this act was attacked on the ground that it denied to some the equal protection of the laws, because the statute struck only at some and not all objects of possible speculation. Mr. Justice Holmes, speaking for this Court, said, "With regard to the objection that this provision strikes only at some and not all of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. * * * * If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no further in what they forbade. The circumstances disclose a reasonable ground for the classification and thus distinguish the case from Connolly vs. Union Sewer Pipe Co., 184 U. S. 540. We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination and a denial of the equal protection of the laws."

Conditions in the mining and manufacturing towns of Pennsylvania may be and doubtless are wholly different from conditions in the towns of Indiana, Kentucky and many other states. These local conditions must be met by local legislation and if the local legislature meets these conditions by classification which is not arbitrary it need go no further. As above demonstrated, this has been done by the Sunbury Ordinance and we submit that it is no more necessary under the Fourteenth Amendment of the Federal Constitution to place wholesalers and manufacturers in the same class with retail solicitors than it is to place lawyers and doctors in the same class.

But, as we stated above, it is of little importance in this

case whether the ordinance is treated as a police regulation or a license tax, and it certainly cannot be disputed that it is a license tax.

Classification for the purpose of license taxation has been several times recognized by Congress. In 1813 a license tax upon the retailers of wines and spirits, for the purpose of providing for the war with Great Britain, was passed. In 1815 it was further enacted (3 Stat. at L., 205 Chap. 40) that it should not be construed "to extend to vine dressers who sell at the place where the same is made wine of their own growth. Nor shall any vine dresser for vending solely at the place where the same is made wine of his own growth be compelled to take out a license as a retailer of wine." In the Internal Revenue Act of 1862 (12 Stat. at L., 432 Chap. 119) a license tax was imposed upon retail dealers in all goods, wares and merchandise but with a proviso that the act should not be construed to require a license for the sale of goods, wares and merchandise made or produced and sold by the manufacturer or producer at the manufactory or place where the same is made or produced, &c. What then can be the difference between classification for taxation purposes and classification for license taxation? If a classification for *general taxation* purposes, such as in American Sugar Refining Co. vs. Louisiana, *supra*, between producer and dealer, does not violate the Fourteenth Amendment to the Constitution, as decided by this Court in American Sugar Refining Co. vs. Louisiana, *supra*, then how can the same classification for *license taxation* purposes violate the same clause of the Constitution?

Under the Sunbury ordinance all dealers, whether located in Sunbury borough or in a sister State, are alike taxed, without favor or discrimination, none are *prohibited*. The exempt class are not dealers, but are manufacturers and producers, are people chiefly engaged in another line of busi-

ness and, while they may also sell their goods the same as a dealer, yet selling their goods or products is not their principal business but, as decided in the cases heretofore cited, is only an incident to their real business, viz, that of producing or manufacturing.

Had this ordinance provided that dealers residing without the state or without the borough should be taxed and that those residing within the state or within the borough should not be taxed, then the position of the plaintiff in error would be well taken, but where dealers are placed in one class and manufacturers and producers in another, and the one class taxed and the other not taxed, we contend that all persons of the same class have been treated alike, under the same circumstances, and that therefore the ordinance is not in violation of the Fourteenth Amendment of the Federal Constitution.

CONCLUSION.

FIRST.—We believe we have demonstrated beyond a doubt that there were no negotiations of sales across State lines ; that when the goods were brought into this State, as to the brooms the original packages were broken, the property co-mingled with the property of the State of Pennsylvania, and was carried from house to house, and that therefore the plaintiff in error was not engaged in inter-state commerce.

SECOND.— We believe we have demonstrated beyond a doubt that, even though the Sunbury ordinance might by the most libéral construction that could be placed upon it, in favor of the plaintiff in error, be considered as a remote interference with inter-state commerce, it could not be considered a constitutional regulation thereof, considered either as a license tax or a police regulation.

THIRD.—We believe we have demonstrated beyond a doubt that there is a marked distinction between a statute enacting a prohibition and a statute levying a license tax, and that there is no difference between classification for general taxation purposes and classification for license taxation purposes, and that, therefore, the classification in the Sunbury ordinance is a proper classification and does not violate the Fourteenth Amendment to the Federal Constitution.

In short, we believe we have demonstrated beyond a doubt that the Sunbury ordinance bears every test of constitutionality to which it has been submitted by the plaintiff in error and that it is therefore the basis of a valid conviction.

Respectfully submitted,

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Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 47.—October Term, 1906.

N. L. Rearick, Plaintiff in Error, vs. The Commonwealth of Pennsylvania. } In Error to the Superior Court of the State of Pennsylvania.

[December 17, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here upon a writ of error to the Superior Court of Pennsylvania, an appeal to the Supreme Court of the State having been disallowed by the last named Court. The Superior Court affirmed a conviction of the plaintiff in error for violating an ordinance of the Borough of Sunbury, which made it unlawful to solicit orders for, sell, or deliver, at retail, either on the streets or by travelling from house to house, foreign or domestic goods, not of the parties' own manufacture or production, without a license for which a large fee was required. In the Court of Quarter Sessions, where the plaintiff in error was convicted, the case was heard upon an agreed statement of facts. Upon these facts the plaintiff in error asked for a ruling that his acts were done in carrying on interstate commerce and that the ordinance was void as to him, under clause 3, section 8, article 1, of the Constitution, the commerce clause; and saved his rights. The Fourteenth Amendment also was relied upon, but it is unnecessary to state details concerning that.

The following is a shortened statement of the facts agreed. An Ohio corporation employed an agent to solicit in Sunbury retail orders to the company for groceries. When the company had received a large number of such orders it filled them at its place of business in Columbus, Ohio, by putting up the objects of the several orders in distinct packages, and forwarding them to the defendant by rail, addressed to him "For A. B.," the customer, with the number of the order also on the package for further identification. The company ultimately kept the orders, but it kept no book accounts with the customers, looking only to the defendant. The defendant alone had authority to receive the goods from the railroad, and when he received them he delivered them, as was his duty, to the customers, for cash paid to him. He then sent the money to the corporation. The customer had the right to refuse the goods if not equal to the sample shown to him when he gave the order. In that or other cases of nondelivery the defendant returned the goods to Columbus. No shipments were made to

the defendant except to fill such orders, and no deliveries were made by him except to the parties named on the packages. In the case of brooms, they were tagged and marked like the other articles, according to the number ordered, but they then were tied together into bundles of about a dozen, wrapped up conveniently for shipment. The defendant had no license, but relied upon the invalidity of the ordinance, as we have said.

If the acts of the plaintiff in error were done in the course of commerce between several States, the law is established that his request for a ruling was right, and that he should have been discharged. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497. *Leisy* v. *Hardin*, 135 U. S. 100. *Caldwell* v. *North Carolina*, 187 U. S. 622. It will be seen from the insertion of the statement concerning the brooms that a ground relied upon by the prosecution to avoid that conclusion was that the goods, or at least this part of them, were not in the original packages when delivered, and that therefore the case did not fall within the decisions last cited, but rather within *Austin* v. *Tennessee*, 179 U. S. 343, *May* v. *New Orleans* 178 U. S. 496, and *Cook* v. *Marshall County*, 196 U. S. 261. In other words, it was contended that the brooms before they were sold had become mingled with, or part of the common mass of goods in the State, and so subject to the local law. But the doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing State goods coming into it from outside. When the goods have been sold before arrival the limitations that still may be found to the power of the State will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale. Hence the prosecution, whatever its assumption on the point last mentioned, sought to show that there was no sale until the goods were delivered and the cash paid for them. The Superior Court contented itself with the suggestion that the contract would have been satisfied by the delivery of articles corresponding to sample, although bought at the next door. The argument submitted to us goes farther, and affirms that the order was not accepted and did not bind the corporation until the delivery took place.

The answer to the latter of the two positions just stated is simple. The fair meaning of the agreed fact that the orders were given to agents employed to solicit them, is that the company offered the goods and that the orders were acceptances of offers from the other side. If there were the slightest reason to doubt that the contracts were made with the company through its authorized agent at the moment when the orders were given, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction. It is for the prosecution to make out its case. We may mention here in parenthesis that of course it does not

matter to the question before us that the contract was made in Pennsylvania. *Brennan* v. *Titusville*, 153 U. S. 289.—The other suggestion, that the company would have been free to deliver any articles equal to sample, as well if bought in Pennsylvania as if coming from Ohio, of course assumes that there was a contract. With regard to this argument it might be an interesting question whether the shipments described amounted to authorized appropriations of the goods to the contracts, notwithstanding the fact that the deliveries were to be only for cash; but we are not required to go into such niceties. The decisions already in the books go as far as it is necessary for us to go in order to decide this case.

'Commerce among the several States' is a practical conception not drawn from the 'witty diversities' (Yelv. 33) of the law of sales. *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399. The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce. In *Brennan* v. *Titusville*, 153 U. S. 289, pictures were sold by sample, as the brooms were here, and although the pictures were consigned to the purchasers directly, the railroad collecting the price, there was no discussion of the question whether the title had passed. In *American Express Co.* v. *Iowa*, 196 U. S. 133, 143, that question was referred to only to be waived. In *Caldwell* v. *North Carolina*, 187 U. S. 622, the pictures were consigned to the defendant, an agent, as here, with the additional facts that the pictures and frames were sent in large packages, which were opened by the agent on their arrival, and that the pictures, then for the first time, were put into their proper frames, and, for all that appears, then for the first time appropriated to specific purchasers. In the court below all the judges agreed that the title did not pass until delivery. 127 No. Car. 521, 526, 527. This Court intimated nothing to the contrary. On the special verdict it well might be that the sale was by sample, as in *Brennan* v. *Titusville*. It was decided that the intervention of an agent made no difference in the result. The Superior Court distinguished that case as one that necessarily involved interstate commerce because it called for the skill of the seller, but no such fact appears in the case or was referred to as a ground of decision, and there is no sufficient warrant for assuming it to be true.

Some argument was made, to be sure, that even if the defendant was engaged in interstate commerce when he delivered the goods, still the ordinance bound him. *American Steel Wire Co.* v. *Speed*, 192 U. S. 500, was especially relied upon. But that decision did not modify the cases that we have cited. It dealt with a case where a mass of nails and iron wire was collected at Memphis from other States, by a manufacturer, for all

purposes; some of the goods to be sold on the spot, some ultimately to be forwarded to purchasers in other States, but no package being consigned to or intended for any special customer, or free from the chance of being sold by a new bargain in Tennessee. Under such circumstances the goods were liable to taxation in that State. The distinction between that case and the present does not need further emphasis. In view of the many decisions upon the matter we deem further argument unnecessary to show that the judgment below was wrong.

Judgment reversed.

True copy.

Test:

Clerk Supreme Court, U. S.